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No. A-851

In the Supreme Court

OF THE

United States

OCTOBER TERM 1997

ROBYN ASTAIRE,
Petitioner,
vs.
BEST FILM & VIDEO CORPORATION,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the appellate court's exercise of its broad discretion under California Rules of Court, Rule 29.5, resulting in its decision not to certify a question of law to the California Supreme Court, where the request to certify was made for the first time after the Court of Appeal had already decided the issue, was an abuse of discretion?

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

Respondent BEST FILM & VIDEO CORPORATION submits this brief in opposition to ROBYN ASTAIRE'S Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Petitioner seeks review of the decision by the United States Court of Appeals for the Ninth Circuit, specifically the Court's order denying certification of the issue of state law to the California Supreme Court and the order denying her petition for rehearing.

The case arose out of BEST FILM'S authorized use of Fred Astaire's name and image in a series of dance instruc-

tional videos. Robyn Astaire[1] filed an action against BEST FILM and the Ronby Corporation alleging that their use of her late husband's image in the videotapes violated her statutory right to control such use under Civil Code § 990. (Pet. App. A-6.)[2]

The parties filed cross-motions for summary judgment. The district court granted summary judgment for ASTAIRE, determining that BEST FILM'S use of ASTAIRE'S name and image in the videotapes violated her rights under § 990. (Pet. App. A-2.) The district court further concluded that BEST FILM'S use did not constitute a use for "advertising, selling or soliciting" as defined in § 990 and therefore not exempt under § 990(n).[3] Finally, the district court held that ASTAIRE'S claim was not preempted by federal copyright law and that the First Amendment did not protect BEST FILM'S use. (Pet. App. A-2, A-3.)

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[1]Robyn Astaire is the widow of performer Fred Astaire and upon Fred's death succeeded Fred's rights in his name, voice, likeness and persona under California Civil Code § 990. (Pet. App. A-2.)

[2]Citations to "Pet. App." refer to Petitioner's Appendix attached to Petition for Writ of Certiorari filed on June 25, 1998.

[3]Section 990(n) provides:

"(n) This section shall not apply to the use of a deceased personality's name, voice, signature, photograph, or likeness, in any of the following instances:

(1) A play, book, magazine, newspaper, musical, composition, film, radio or television program, other than an advertisement or commercial announcement not exempt under paragraph (4).

(2) Material that is of political or newsworthy value.

(3) Single and original works of fine art.

(4) An advertisement or commercial announcement for a use permitted by paragraph (1), (2), or (3)."

(Cal. Civ. Code § 990(n).) (Pet. App. D.)

On March 30, 1994, the district court certified the orders regarding summary judgment for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) concluding that the issues are dispositive of this case and raise questions of significant public interest. (Resp. App. A-8.)[4] BEST FILM petitioned for permission to appeal following certification by the district court. ASTAIRE opposed certification on the grounds that BEST FILM, failed to demonstrate that an immediate appeal would "materially advance the ultimate termination" of this litigation, as required by Section 1292(b); and based on the court's broad discretion to deny certification, where, as here, the case did not present the "necessary" exceptional circumstances. (Resp. App. B-8.) The Ninth Circuit denied BEST FILM'S permission to appeal. (Resp. App. C-1.) A stipulated judgment was then entered which allowed this appeal.

More than three years following judgment in favor of ASTAIRE, the Ninth Circuit reversed the district court's judgment and remanded with instructions to enter judgment in favor of BEST FILM. (Pet. App. A-17.) The Court held that BEST FILM'S use of ASTAIRE'S name and image in the instructional videotapes was exempt from liability under § 990(n). (Pet. App. A-17.)

ASTAIRE petitioned the court for rehearing *en banc.* (Pet. App. B-1.) The petition was denied and the written opinion was amended, (Pet. App. B.) ASTAIRE then filed a motion to stay issuance of the mandate *and to certify the question of state law to the California Supreme Court* pursuant to Rule 29.5 and a second petition for rehearing on the same grounds. The Court similarly denied ASTAIRE'S motion for stay and certification and her second petition for rehearing. (Pet. App. C-1.)

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[4]Citations to "Resp. App." refer to Respondent BEST FILM'S Appendix attached hereto and incorporated by reference herein.

ASTAIRE now challenges the Ninth Circuit's decision, including the Court's orders denying rehearing and certification.

A. Factual Background

This action arose out of the alleged unauthorized use of Fred Astaire's name and image in instructional videos produced by BEST FILM. (Pet. App. A-6.) Mr. Astaire granted the Ronby Corporation an exclusive license to use his name and likeness in connection with the operation of dance studios, schools and related activities. (Pet. App. A-6.) Ronby entered into an agreement with BEST FILM to produce dance instructional videos using Mr. Astaire's name and likeness. (Pet. App. A-6.) BEST FILM has been manufacturing and distributing videotapes known as "Fred Astaire Dance Series." (Pet. App. A-6.) The videotape includes narration, instruction and about 90 seconds of footage from two of Mr. Astaire's films, *Second Chorus* and *Royal Wedding* ("the ASTAIRE film clips"). Mr. Astaire died in 1987 and was survived by his wife, Robyn Astaire, who succeeded to all rights in his name and likeness, pursuant to Civil Code § 990. Mrs. Astaire is the petitioner in this action.

B. Procedural History

On January 19, 1990, ASTAIRE filed this action in federal court against BEST FILM and the Ronby Corporation, alleging violation of her § 990 rights by using Mr. Astaire's image in "the ASTAIRE film clips" in the videotapes without her permission and related claims.[5] (Pet.

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[5]This action was originally filed in the Los Angeles Superior Court on December 14, 1989. It was removed to the Central District on January 19, 1990. The other claims, included trademark, trade name and service mark infringement; unfair competition; and violation of the Lanham Act, 15 U.S.C. § 1125(a). ASTAIRE asserted an additional

App. A-7.) Following summary adjudication of the related claims in favor of BEST FILM and Ronby and settlement of contract claims between BEST FILM and Ronby, BEST FILM and ASTAIRE filed cross-motions for summary judgment on January 10, 1994. (Resp. App. A-16.)

On March 11, 1994 the district court granted summary judgment for ASTAIRE, determining that BEST FILM'S use of ASTAIRE'S name and image in the videotapes violated her rights under § 990. (Pet. App. A-2.) The district court further concluded that BEST FILM'S use did not constitute a use for "advertising, selling or soliciting" as defined in § 990 and therefore was not exempt under § 990(n). Finally, the district court held that ASTAIRE'S claim was not preempted by federal copyright law and that the First Amendment did not protect BEST FILM'S use. (Pet. App. A-2, A-3.)

On March 30, 1994, District Court Judge, David V. Kenyon certified his summary judgment orders of November 26, 1990, July 17, 1991 and March 11, 1994 for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) and stayed all proceedings in the district court. (Resp. App. A-8.) Judge Kenyon concluded the issues were dispositive of the case and raised questions of significant public interest. (Resp. App. A-8.) BEST FILM petitioned for permission to appeal following certification by the district court of the sole controlling question of law in this matter, that is, whether the mere use of a deceased celebrity's likeness in instructional videotapes violated Civil Code § 990 where it has been judicially determined that there is no use of the celebrity's likeness for advertising or selling the

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breach of contract claim against the Ronby Corporation only. ASTAIRE and Ronby entered into a settlement agreement in July of 1993 and therefore Ronby is no longer a party to this litigation, (Resp. App. B-11.)

videotapes and where the use is reasonably related to the education message found in the videotapes. (Resp. App. A-17)

Contrary to the position ASTAIRE now asserts, ASTAIRE opposed certification of the state law issue on the grounds that BEST FILM, failed to demonstrate that an immediate appeal would "materially advance the ultimate termination" of this litigation, as required by Section 1292(b). (Resp. App. B-7.) ASTAIRE argued:

> "To the contrary, Best's Petition would, if granted serve to ensure that the district court proceedings in this case (which have already lasted more than five years) would be delayed for at least an additional 12-18 months pending briefing, argument, and decision in this court. This is so because regardless of this court's disposition of the issues raised by Best, further proceedings would be required in the district court, and further appeals to this court would almost certainly ensue." (Resp. App. B-7, B-8.)

ASTAIRE further opposed BEST FILM'S petition to certify the state law issue on the ground that BEST FILM did not demonstrate the existence of substantial ground for difference of opinion. (Resp. App. B-8.) ASTAIRE asserted that the district court's ruling was in "accord with settled law and with the language, purpose, and legislative history of California Civil Code Section 990." (Resp. App. B-8.)

ASTAIRE lastly opposed certification of the state law question on the basis of the court's broad discretion to deny certification. ASTAIRE stated,

> "the Petition should be denied as a matter of this court's discretion because this case manifestly does not present the sort of exceptional circumstances that are generally required before this court will accept such

> interlocutory review under § 1292(b)." (Resp. App. B-8.)

On May 31, 1994, the Ninth Circuit denied BEST FILM'S petition for permission to appeal pursuant to 28 U.S.C. § 1292(b). (Resp. App. C-1.)

C. The Court Of Appeals' Decisions

On June 20, 1997 the Ninth Circuit Court of Appeals reversed the judgment of the district court holding that:

> "under California law, a videotape manufacturer may use clips from a deceased entertainer's movies for internal advertising of instructional videotapes under a state statutory exemption for such use in " 'film'." (Pet. App. A-2.)

Reviewing the issue of statutory interpretation *de novo* from a grant of summary judgment, the panel majority determined that Section 990(n) immunized BEST FILM'S use of the public domain film clips on two grounds. Agreeing with BEST FILM, the Panel first, found that the provisions of Section 990(n)(1), which grant a broad exemption for any uses of a celebrities' image in "film" and other protected mediums of expression, applied with equal force to videotapes such as the "Fred Astaire Dance Series". (Pet. App. A-11, A-12.) Alternatively, the Court ruled *arguendo* that Section 990(n)(4) — a subpart explicitly referenced in Section 990(n)(1) — also exempted the use of the film clips as embodied in the videotapes even if the film clips could be considered "an advertisement or commercial announcement." (Pet. App. A-12, A-13.) Having ruled in favor of BEST FILM on the basis of substantive law, the Court held it was unnecessary to reach the remaining issues of federal law."[6] (Pet. App. A-17.)

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[6] "Having concluded that Best's use of the Astaire film clips is exempt from liability under § 990, we need not reach the other issues presented

On July 7, 1997, ASTAIRE filed her first of two petitions for rehearing *en banc,* alleging the Ninth Circuit improperly decided the case on a ground neither raised below nor briefed in this court; that the Court's interpretation of § 990(n)(4) will lead to unjust results; and that the Court based its holding on a misreading of the legislative history of § 990. The Court denied ASTAIRE'S petition and filed its order along with an amended opinion on February 19, 1998. (Pet. App. B.)

On February 26, 1998, ASTAIRE filed her second petition for rehearing, on the ground that the Ninth Circuit should exercise its discretion to certify the state law question to the California Supreme Court pursuant to California Rules of Court, Rule 29.5. BEST FILM opposed the petition for rehearing on several grounds, including: that ASTAIRE had waived her right to seek state court adjudication by filing her claim in federal court; that certification is inappropriate after the appeal, as here, has been finally determined; and that the requested question for certification would not be determinative of the appeal. By order of the Court on April 13, 1998, ASTAIRE'S petition for rehearing was denied. (Pet. App. C-1.)

On March 2, 1998, ASTAIRE filed a motion to stay issuance of the mandate and to certify to the California Supreme Court the controlling issue of state law at issue.[7] By order of the Court on April 13, 1998, ASTAIRE'S motion to stay issuance of the mandate and to certify

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by the parties' arguments, *viz.,* whether Best's use is covered by § 990(a), whether Mrs. Astaire's § 990 claim is preempted by the federal Copyright Act, and whether holding Best liable violates the First Amendment." (Pet, App. A-17 fn3.)

[7]ASTAIRE'S motion was based on the same arguments proffered in her second petition for rehearing cited above. BEST FILM'S opposition was likewise based on the same grounds stated in its opposition to ASTAIRE'S second petition for rehearing.

question to the California Supreme Court were denied. (Pet. App. C-1.)

D. Reasons Why The Petition Should Be Denied

This case does not merit review. The decisions of the Ninth Circuit present none of the established grounds for exercise of certiorari jurisdiction and, in any event, are correct in the aspects challenged by petitioner.

The Court of Appeals has broad discretion to deny certification of the state law question to the California Supreme Court and, where as here, its decision is supported by procedural and substantive facts in the record, the decision should not be disturbed.

A separate and independent ground to deny ASTAIRE'S petition is that she has been less than forthright with this Court. Specifically, ASTAIRE failed to advise this Court that it sought certification of the state law question after the appeal had been finally determined and therefore certification was inappropriate under California Rules of Court, Rule 29.5 which limits questions for certification to those "determinative of a cause pending in the certifying court." (Cal. Rule of Court 29.5(a)(2).) (Pet. App. E-1.) ASTAIRE also failed to disclose to this Court that her extension of time to file her petition was procured for the purpose of raising First Amendment issues, which ASTAIRE did not present anywhere in the Petition, nor are they possibly argued in a manner to assist petitioner.

Certification will only cause a further significant delay in this case. The California Supreme Court ordinarily requires two years to resolve cases presented to it for decision. That would add to the typical three year life span of an appeal in the Ninth Circuit.

This case does not present any novel or important questions of federal law. The First Amendment issue, as raised

by BEST FILM and *not* by petitioner, was the only potential constitutional issue in this case. Such issue, however, was never reached by the Ninth Circuit. All other issues in this case are matters of California state law not deserving address by the California Supreme Court since it can be competently resolved by the Ninth Circuit Court of Appeals.

On these grounds, ASTAIRE'S Petition for Writ of Certiorari should be denied.

I.

THE COURT OF APPEALS' DECISION TO DENY CERTIFICATION OF THE STATE LAW ISSUE TO THE CALIFORNIA SUPREME COURT WAS WITHIN THE SOUND DISCRETION OF THE REVIEWING COURT AND ITS DECISION SHOULD NOT BE DISTURBED SINCE IT IS SUPPORTED BY PROCEDURAL AND SUBSTANTIVE FACTS IN THE RECORD.

The Supreme Court has firmly established that decisions whether to certify a question of law to a state court, "rests in the sound discretion of the federal courts." (*Lehman Brothers v. Schein et al.* (1974) 416 U.S. 386, 391, 94 S.Ct. 1741, 1744, *Complaint of McClinn* 744 F.2d 677, 681 (9th Cir. 1984) (remanded on other grounds).) In *Lehman Brothers*, the Court vacated and remanded the decision of the Court of Appeals so it could consider the issue of certification. In so doing, the Court cautioned not to disturb decisions merely because the means for certification were available but not used, in light of the additional time and money required to certify an issue of state law. In his concurring opinion, Justice Rhenquist stated:

> "If a district court or court of appeals believes that it can resolve an issue of state law with available research

> materials already at hand, and makes the effort to do so, its determination should not be disturbed simply because the certification procedure existed but was not used." (*Lehman Brothers, supra* 416 U.S. 386 at p. 395, 94 S.Ct. 1741 at p. 1746) (concurring opinion).)

In *Complaint of McClinn*, the Ninth Circuit denied certification of a state law question with respect to application of an Alaskan statute based on its finding that the legal issue involved would not be determinative of the case pending before it. (*Complaint of McClinn, supra* 744 F.2d at pp. 681 – 682 (9th Cir. 1984).) The Court underscored the delays arising from certification, since the issue to be certified was only one of many involved in the case. (*Id.* at 681.)

A. Certification Will Only Cause Further Undue Delay In This Case.

In deciding whether to certify a question of state law, the Fifth Circuit takes into consideration whether the question is close and whether it is "important to the state in terms of comity." (*Florida ex rel. Shevin v. Exxon Corp.* 526 F.2d 266, 275 (5th Cir. 1976) *cert. denied,* 429 U.S. 829, 97 S.Ct. 88.) The Court also deliberates upon the potential delays involved and "whether the legal issue can be framed to produce a helpful response by the state." (*Id.*)

This Court has also addressed concerns of undue delay and has determined that notwithstanding the benefits of certification over abstention, certification "entails more delay and expense than would an ordinary decision on the state question on the merits by the federal court." (*Lehman Brothers, supra* 416 U.S. at p. 395, 94 S.Ct. at p. 1744; see *Clay v. Sun Insurance Office. Ltd.* (1964) 363 U.S. 207, 226–227, 80 S.Ct. 1222.)

Certification will only cause a further significant delay in this case. The California Supreme Court ordinarily requires two years to resolve cases presented to it for decision. That would add to the typical three year life span of an appeal in the Ninth Circuit. In light of the Ninth Circuit's ability to resolve the issue of state law with respect to Civil Code § 990, there is no need for the delays associated with certification.

B. Once The Court Of Appeals Issues Its Opinion, It Is Inappropriate To Certify Questions Of State Law To The State Supreme Court.

Under California Rules of Court, Rule 29.5, questions of state law may only be certified by the Ninth Circuit when "the questions may be determinative of a cause *pending* in the certifying court." (Cal, Rules of Court, Rule 29.5(a)(2) (emphasis added). On February 25, 1997, the Ninth Circuit issued an order denying ASTAIRE'S initial petition for rehearing and suggestion for rehearing *en banc*. This order concluded the appeal before the Ninth Circuit. According to the conditions of Rule 29.5, therefore, the California Supreme Court may not consider the question requested to be certified with respect to Civil Code section 990.

C. There Remained Other Issues In The Litigation Which Would Have Precluded Any Benefit Of A State Court Ruling On The State Law Issue.

Even if the Ninth Circuit had revived the appeal for purposes of certification, and the state court had ruled in ASTAIRE'S favor, the state court ruling would not have been determinative of the appeal. As the Ninth Circuit noted, its opinion obviated the need to consider "whether Best's use is covered by § 990(a), whether Mrs. Astaire's § 990 claim is preempted by the federal Copyright Act, and whether holding Best liable violates the First Amendment." (Pet. App. A-17, n3.) If the requested certification had

resulted in a state court determination in ASTAIRE'S favor, the Ninth Circuit would still have had to consider the remaining issues. The Ninth Circuit's decision to deny certification here was not a novel idea as demonstrated by its ruling under similar circumstances in *Complaint of McLinn,* where the Court denied state court certification because the appeal involved several other issues and certification would not necessarily be determinative of the outcome of the appeal. (*Complaint of McLinn, supra* 744 F.2d at pp. 681-682 (9th Cir. 1984).)

D. The Question Of Law Raised Under Civil Code Section 990 Does Not Rise To The Level Required For Review By The California Supreme Court.

Not every unresolved issue of law is deemed by the California Supreme Court to be a genuinely important issue of law. Although the Civil Code § 990 issue has not yet been interpreted by California courts, the certification process will probably only be utilized by the California Supreme Court to resolve what it considers to be truly important issues of California law. The questions presented here do not rise to that level.

II.

PETITIONER'S LACK OF CANDOR WITH THIS COURT REGARDING HER GROUNDS FOR AN EXTENSION OF TIME AND HER "SELECTIVE" FAILURE TO ADVISE THIS COURT OF SIGNIFICANT TIMING ISSUES WITH RESPECT TO THE REQUEST FOR CERTIFICATION IS AN INDEPENDENT BASIS TO DENY THIS PETITION.

A. In Applying To This Court For An Extension Of Time To File Her Petition, ASTAIRE Relied On

Grounds Never Mentioned In Her Petition And Which Could Not Have Assisted Her Position.

In her first application for an extension of time to file this Petition, ASTAIRE stated that she was "presently considering whether to file a petition for a writ of certiorari challenging the panel's apparent conclusion that imposition of liability on BEST FILM would create First Amendment concerns." The Ninth Circuit, however, *never reached* the First Amendment issue. Further, it was BEST FILM, *not ASTAIRE,* who argued that the First Amendment issue was applicable to this case. The Court of Appeals having ruled in favor of BEST FILM on the basis of substantive state law, there is no First Amendment issue to be considered by this Honorable Court.

In footnote 4 of page 1525 of the Ninth Circuit opinion, the Court stated:

> "Having concluded that Best's use of the Astaire film clips is exempt from liability under § 990, we need not reach the other issues presented by the parties' arguments, viz., whether Best's use is covered by § 990(a), whether Mrs. Astaire's § 990 claim is preempted by the federal Copyright Act, and whether holding Best liable violates the First Amendment." (Opinion, p. 1525, fn. 4.) (Pet. App. A-17.)

ASTAIRE also relies on footnote 3 of page 1524 as possible grounds for a Petition to this Court for Writ of Certiorari. Such footnote mentions only that a "potential First Amendment concern" might have arisen had BEST FILM been found liable for the use of film clips in a videotape. The use of film clips by BEST FILM, however, was held to be exempt under California Civil Code section 990(n), and the Ninth Circuit did not reach any First Amendment issues.

III.

AS PREVIOUSLY ARGUED BY ASTAIRE THE ISSUES RAISED UNDER CIVIL CODE SECTION 990 ARE DISPOSITIVE OF THIS CASE.

Petitioner's argument that the Civil Code section 990 issues are not dispositive runs directly counter to the arguments made by ASTAIRE in her Opposition to BEST FILM'S Petition for Permission to Appeal under 28 U.S.C. § 1292(b). (Resp. App. B.) There, on behalf of ASTAIRE, Mr. Hungar argued vigorously that these issues would, in fact, be dispositive and that granting BEST FILM'S petition would only result in further unduly delay. (Resp. App. B-7, B-8.) ASTAIRE argued:

> "... Best's Petition would, if granted serve to ensure that the district court proceedings in this case (which have already lasted more than five years) would be delayed for at least an additional 12–18 months pending briefing, argument, and decision in this court. This is so because regardless of this court's disposition of the issues raised by Best, further proceedings would be required in the district court, and further appeals to this court would almost certainly ensue." (Resp. App. B-8.)

ASTAIRE further opposed BEST FILM'S petition to certify the state law issue on the grounds that BEST FILM did not demonstrate the existence of substantial ground for difference of opinion. (Resp. App. B-8.) ASTAIRE asserted that the district court's ruling was in "accord with settled law and with the language, purpose, and legislative history of California Civil Code Section 990." (Resp. App. B-8.)

In further contradiction of ASTAIRE'S current position in its Petition for Writ, she opposed certification of the state law question on the basis of the court's broad discretion to deny certification. ASTAIRE stated,

> "the Petition should be denied as a matter of this court's discretion because this case manifestly does not present the sort of exceptional circumstances that are generally required before this court will accept such interlocutory review under § 1292(b)." (Resp. App. B-8.)

On May 31, 1994, the Ninth Circuit denied BEST FILM'S petition for permission to appeal pursuant to 28 U.S.C. § 1292(b). (Resp. App. C-1.) ASTAIRE'S unequivocal change in position, initially opposing certification and now vigorously in favor of it, is yet another factor supporting the Ninth Circuit's decision to deny ASTAIRE'S request for certification.

IV.

REHEARING WAS PROPERLY DENIED SINCE THE COURT OF APPEALS CONSIDERED ALL RELEVANT INFORMATION IN RENDERING ITS OPINION.

"The purpose for petitions for rehearing . . . is to ensure that the panel properly considered all *relevant* . . . information in rendering its decision." (emphasis added) (See *Armster v. United States Dist. Ct.,* 806 F.2d 1347, 1356 (9th Cir. 1986).) Rehearing *en banc* will ordinarily only be ordered when necessary to resolve an intra-circuit conflict or when "the proceeding involves a question of exceptional importance." (Fed. Rule App. Proc. 35 (a).) Rehearing, and especially rehearing *en banc,* is both inappropriate and unnecessary since the issue here is purely one of statutory interpretation that implicates no federal interest.

CONCLUSION

As demonstrated above, the Ninth Circuit's decision to deny certification of the state question to the California Supreme Court was supported by both substantive and procedural facts in the record and therefore should not be disturbed. Particularly, ASTAIRE'S failure to advise this Court that it sought certification of the state law question after the appeal had been finally determined and therefore certification was inappropriate under California Rules of Court, Rule 29.5, the further significant delays caused by certification in this case and the fact that there is no important question of federal law presented show this case does not merit review.

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Dated: July 24, 1998

Respectfully submitted.

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IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BEST FILM VIDEO CORP., a corporation,
Petitioner,

v.

ROBYN ASTAIRE, an individual,
Respondent.

PETITION FOR PERMISSION TO APPEAL UNDER 28 U.S.C. 1292(b)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CV 90-0261 KN

(Honorable David V. Kenyon and Honorable Irving Hill)

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Best Film & Video Corp.

CORPORATION DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Petitioner Best Film & Video Corp. ("Best Film") states that it has not issued shares to the public. Furthermore, Best Film does not have any parent company, subsidiary or affiliate which has issued shares to the public.

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I.
PREFATORY STATEMENT

Petitioner Best Film & Video Corp. ("Best Film") hereby petitions for permission to appeal following certification by the United States District Court of the sole controlling question of law in this action: Does mere use of public domain film clips of a deceased celebrity's likeness in instructional videotapes violate the right of publicity under California Civil Code § 990 where there is no use of the celebrity's likeness for advertising or selling the videotapes and where the use is reasonably related to the videotapes' educational message?[1] The District Court answered that question "Yes," raising issues of importance and first impression in this Court and in California concerning: (1) the scope of the right of publicity under § 990; (2) the potential conflict with and preemption by Federal Copyright law; and (3) the potential inconsistency of a broad interpretation of § 990 with the First Amendment. Recognizing that these issues are dispositive of this action and raise questions of significant public interest, the District Court properly certified this case for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Best Film respectfully urges this

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[1] Annexed hereto as Exhibit A is the Order of the United States District Court dated March 30, 1994 certifying the attached orders for appeal pursuant to 28 U.S.C. § 1292(b) and amending the Orders from which an immediate appeal is now sought. That Order amends each of the prior Orders of the United States District Court that are the subject of this Petition. Each of these Orders — dated November 26, 1990, July 17, 1991, and March 11, 1994, respectively — concern issues of law determined on Motions for Summary Judgment. These three Orders are appended to this Petition as Exhibits B, C and D, respectively. The Court's November 26, 1990 Order, Exhibit B, was made orally. *See* Exhibit B, Transcript of November 26, 1990 proceedings, at p. 63, lines 13–24, adopting the tentative decision previously set out at pp. 25–36. Each of these determinations of law relate directly to the same controlling issue of law now raised in this Petition.

Court to permit an immediate appeal pursuant to that certification.

As originally brought, this case involved claims by Robyn Astaire, the widow of the late entertainer Fred Astaire against Ronby Corporation (the owner of the Fred Astaire Dance Studio Franchise, co-producer of the videotapes in question and the licensee of the right to use Fred Astaire's name, image and likeness related thereto) and against Petitioner Best Film (a co-producer and licensed distributor of videotapes through Ronby). Respondent Robyn Astaire asserted that the production and distribution of the videotapes violated license agreements Fred Astaire had granted during, his lifetime for operation of the Fred Astaire Dance Studios utilizing his name, image and likeness, and otherwise violated trademarks and amounted to acts of unfair competition. On Motion for Summary Judgment, Respondent's claims for violation of trademark and unfair competition were dismissed. Respondent's breach of license claims brought against Ronby Corp., the operator of the Fred Astaire Dance Studios, were also dismissed by a settlement that did not include Best Film. Thus, the only issue remaining is Respondent's claim that the mere use of 93 seconds of public domain film clips of Astaire dancing in instructional dance videotapes authorized by Ronby Corp. violates the right of publicity granted to a deceased celebrity under California Civil Code § 990.

The controlling issue of law that is the subject of this Petition is not simply case dispositive here, in its broader terms it is an issue of great significance in this Information Age. Can a celebrity or that celebrity's heirs prevent the duplication and incorporation of public domain materials (be they films clips, photographs or other media) in a medium of expression (be it a videotape, book or a CD ROM) by use of California's statutory right of publicity? Here, a celebrity's heirs seek invoke California's statutory

right of publicity protections to prevent duplication and incorporation of public domain material in a medium of expression. They do so in a context devoid of improper association of the celebrity's name with a product or any possible casting of that celebrity in a false light. The most obvious implication is that allowing such an unprecedented extension of the publicity right runs afoul of, and is pre-empted by, the Copyright Act. Moreover, § 990 itself expressly exempts such a use unless it is an "advertisement or commercial announcement." Cal. Civ. Code § 990(n).[2] Finally, as a matter of settled case law, a right of publicity claim must be accompanied by the added element of use for advertising and selling — an element which removes such a claim from copyright preemption and potential violation of First Amendment rights inherent if mere use is actionable. As the Court below has found as a matter of law, there simply is no use for advertising or selling in this case.

No court has ever addressed the issue of mere use standing alone. Right of publicity cases are almost always directed to use for advertising and selling — which is totally absent here. *See, e.g., White v. Samsung Electronics. Inc.*, 971 F.2d 1395 (9th Cir. 1992), *cert. denied*, __U.S. __, 113 S.Ct. 2443, 124 L.Ed.2d 660 (1993) Vanna White's image used to sell electronic products); *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992), *cert. denied*, __U.S. __, 113 S.Ct. 1047 (1993) (singer Tom Waits' image used to sell snack food); *Midler v. Ford Motor, Co.*, 849 F.2d 460 (9th Cir. 1988) (singer Bette Midler's image used to sell automobiles). And no court has ever held what the District Court has held here: that unconsented use in any manner is a *per se* violation of the publicity right granted under § 990 if

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[2]That exception provides in relevant part: "This Section [§ 990] shall not apply to the use of a deceased personality's . . . likeness in . . . a film . . . or television program, other than an advertisement or commercial announcement." Cal. Civ. Code § 990(n)(1).

that use is on "products, merchandise or goods," which the Court below has interpreted to mean a videotape or, presumably, any other protected medium of expression. Indeed, the decision of the Court below on the controlling question of law represents a significant, if not radical, extension of the right publicity, which necessarily assumes a "substantial basis for a difference of opinion" under Rule 5 of the Federal Rules of Appellate Procedure.

Determination of this fundamental issue is compelled by the greater public interest. At the same time, because it is entirely case dispositive, its determination at this juncture will "materially advance the termination of this litigation" within the meaning of Rule 5 of the Federal Rules of Appellate Procedure. This controlling question is the sole remaining issue in this case and one which must ultimately be decided in this Court. It should be decided at this juncture. Otherwise, if this Petition is not granted, it will compel the case to be pretried again. Then the case would proceed to trial on damages under a legal standard that has no precedent and no guidelines as to what such a damages phase would entail. On the other hand, if a legal standard is determined by this Court with finality, it will allow the Parties to be able to evaluate their respective positions in this action — related not only to trial, if any is required, but also the Parties' rights to attorneys' fees after what has amounted now to years of litigation. Thus, the District Court was entirely correct in certifying this issue for appeal — recognizing the unnecessary waste of judicial resources that further proceedings in the District Court would entail prior to determination of this issue of law in this Court, where this determining issue must be decided in any event.

II.
STATEMENT OF FACTS

A. Factual Background

This case involves the production and distribution of instructional dance videotapes under the auspices of, and pursuant to a license from Ronby Corp., the owner of the Fred Astaire Dance Studios. The Fred Astaire Dance Studios were founded by Fred Astaire and one Chester Casanave in 1946 and utilized a step-by-step method of dance instruction developed by Mr. Astaire himself. Mr. Astaire withdrew from the business in 1953 and sold his rights under a contract that granted him a 40-year royalty from the Company's revenues while reserving for Mr. Casanave the right to continue the dance teaching business. Pursuant to these agreements, Mr. Astaire expressly gave Mr. Casanave the license to franchise dance studios under the trademark "Fred Astaire Dance Studios" and "Fred Astaire Franchised Dance Studios," and the right to market dance instructional materials using the name, image and likeness of Fred Astaire.

This license was renewed in 1965 after the Fred Astaire Dance Studios Corporation changed its name to Ronby Corporation. By written agreement dated January 15, 1965, Mr. Astaire granted Ronby a "perpetual exclusive right and license to use . . . the name 'Fred Astaire' in connection with the conduct and operation of dance studios and schools and related activities" as well as "the right to utilize pictures, photographs and other likenesses of [Mr. Astaire] as had been previously used, and new photographs and likenesses as [Mr. Astaire] may approve in writing." For this agreement, Fred Astaire received an additional $155,000.

On August 3, 1987, following Mr. Astaire's death, Respondent Robyn Astaire — the widow of Fred Astaire and his alleged successor-in-interest — filed a Registration

of Claim under § 990 with the California Secretary of State. In that Registration, Respondent claimed 100% of the rights to Fred Astaire's name, voice, signature, photograph, or likeness "except for the right to franchise and to cause to be operated, dance studios under the name and image of Fred Astaire."

On March 15, 1989, Ronby and Best Film entered into an agreement to co-produce a series of dance instructional videotapes using the Fred Astaire Dance Studios' distinctive and proprietary dance curriculum. Five instructional videotapes were produced, which range in length from 37 to 43 minutes. Each videotape opens with 93 seconds of dance scenes taken from two Fred Astaire movies, both of which predate the formation of the Fred Astaire Dance Studios. These movies, "Royal Wedding," and "Second Chorus," were copyrighted by the studio producing the pictures and each copyright has lapsed without renewal. Therefore, each movie is in the public domain for copyright purposes. Moreover, each of the films is readily available and in distribution by various public domain video distributors.

Best Film began distributing the Fred Astaire Dance Studios instructional videotapes in 1989. As the Court below has found, Best Film has at all times marketed the videotapes in conformity with the Fred Astaire Dance Studios license and without using the film clips in question or other likenesses of Astaire to advertise or sell the videotapes. The jacket of the videotapes identifies them under the Fred Astaire Dance Studios trademark name and contains an authorized quotation from Astaire regarding the importance of good dance instruction in learning to dance. All advertising and marketing materials produced in conjunction with the distribution of the videotapes likewise only identify themselves with the trademark "Fred Astaire Dance Studios" in conformity with the Ronby license and, notably,

Respondent's own § 990 Registration expressly allowing such a use.

B. Procedural History

This action was commenced on December 19, 1989, a few months after the initial release of the instructional videotapes. Although an injunction was sought in the Complaint, Respondent has never attempted to enforce any injunctive remedy. The central thrust of Respondent's Complaint turned upon the right to distribute the videotapes in the first place. In addition, claims were asserted regarding the use of Fred Astaire's name and persona on the jackets and packaging related to the marketing of the videotapes. These claims included the prominent use of Fred Astaire's name and the title for the videotape "Fred Astaire Franchised Dance Studios" along with the prominent use of the quotation by Fred Astaire regarding the significance of good instruction in learning to be a dancer. Respondent Robyn Astaire further claimed that this packaging violated trademarks on the name of Fred Astaire and that the production and distribution of the videotapes amounted to unfair competition under the Lanham Act by appropriating rights in the Astaire image and likeness. With regard to alleged appropriation of publicity rights, the Complaint includes the claim that, in the words of the Complaint's charging allegation:

> "Utilization of the name, photograph and likeness of Fred Astaire . . . for the purpose of advertising and selling . . . Best's video cassette products [violated Respondent's rights under Cal. Civ. Code § 990]." Complaint, Para. 8, p. 3.

Respondent's trademark and unfair competition claims were resolved by summary adjudication in favor of Defendants Best and Ronby on July 17, 1991. *See* order, attached as Exhibit C. The Court also held that the videotapes themselves were properly part of the instructional activities

of the Fred Astaire Dance Studios as authorized by Fred Astaire and that the production and marketing of the videotapes under the name of the Fred Astaire Dance Studios did not violate Astaire's publicity rights. The Court further held that Best Film was licensed to use the Fred Astaire name and image on its packaging and advertising as a matter of federal trademark law. However, consistent with Judge Hill's prior ruling of November 26, 1990, the Court refused to find copyright preemption or that the exception in § 990(n)(1) for uses in film or videotape unrelated to advertising and selling apply here. The Court also found that material issues of fact existed regarding the breach of contract claims between Astaire and Ronby. In July of 1993, Ronby and Respondent settled their claims on terms Respondent has refused to disclose — thus removing any contract claims from this litigation and leaving only the right of publicity claim set forth in this Petition.

On January 10, 1994, the parties filed cross-motions for summary judgment/summary adjudication. On March 11, 1994, the District Court issued its ruling on these motions. In that Order, the Court made three key findings of fact and law: (1) Best's use of Astaire's likeness as incorporated in the videotapes in itself constitutes a violation of § 990 under the statute's "on or in products, merchandise, or goods" language; (2) Best Film did not use Astaire's likeness in the videotapes for purposes of advertising or selling, or soliciting purchases of the videotapes within the meaning of § 990; and (3) the First Amendment does not protect Best Film's use of Astaire's likeness from a right of publicity claim under § 990.

III.
QUESTION PRESENTED:

Is the mere use of public domain film clips of a deceased celebrity's likeness in instructional videotapes violative of

the right of publicity under California Civil Code § 990 where there is no use for advertising and selling the videotape and where the use is reasonably related to the videotape's educational message?

IV.
STATEMENT OF REASONS WHY A SUBSTANTIAL BASIS EXISTS FOR A DIFFERENCE OF OPINION ON THE QUESTION PRESENTED

Because the District Court has determined that unconsented use of public domain film clips in the body of an instructional videotape amounts to a *per se* violation of § 990, this case stands in stark contrast to the entire body of California right of publicity law. Thus, a difference of opinion on this controlling question of law within the meaning of Fed.R.App.P. 5 is necessarily stated. The controlling question of law presented here raises four issues upon which this significant difference of opinion is grounded. First, a difference of opinion exists as to whether such a ruling as regards public domain film clips runs directly afoul of the Copyright Act and is therefore preempted as a matter of law. Second, the question is raised as to whether this use falls within the exception found in § 990(n)(1) which provides that "[t]his Section shall not apply to the use of a deceased personality's name, voice, signature, photograph, or likeness in . . . a . . . film . . . or television program, other than an advertisement or commercial announcement. . . . Third, the District Court's *per se* definition of § 990 would effectively overrule longstanding case law, embodied in § 990 itself including § 990(n), requiring a showing of use for advertising or selling before a violation of publicity rights can be found. Finally, there is a significant question as to whether this *per se* rule, where it is applied to bar instructional materials that utilize a deceased personality's image

and likeness, is in itself violative of First Amendment principles.

A. Use of Public Domain Film Clips Cannot Be Barred by State Law Because of Copyright Preemption

The effect, or a portion thereof, of the Court's ruling on the controlling issue of law in this case is to determine that any use *(i.e.,* mere duplication and incorporation) of a work that has fallen into the public domain is prohibited if that work includes in it the image and likeness of a deceased celebrity who has not consented to such a use.[3] In this way, the Court has interpreted § 990 so as to place it on a collision course with the Copyright Act. If it is entirely lawful to duplicate public domain film clips of Fred Astaire and incorporate them in another work under federal copyright law (which it is), state law cannot render that same duplication and use a misappropriation unless consent is obtained. But that is precisely the effect of the Court's ruling below. If § 990 applies to the mere duplication and incorporation of public domain film clips including the image of a celebrity (the only "use" in this case), then that celebrity or his heirs can effectively prohibit such a use as unauthorized. To give such an interpretation to § 990 would be to create a state right that is in direct conflict with what is lawful under the Copyright Act. Such a *per se* rule is clearly preempted by the Copyright Act.

There is no question that the films from which these clips are taken were at one time the proper subject of copyright under 17 U.S.C. § 102(a) and that these films have fallen into the public domain. There is also no question that the

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[3]It bears emphasis that Fred Astaire has never owned, and does not own, any interest in the copyrights to the films in question or the clips from them. The copyrights to these films lapsed years ago. In any event, Astaire's own performances were undoubtedly "works for hire" under 17 U.S.C. § 201(b), thus depriving him of any copyright claim.

copyright holder, while it held a valid, existing copyright, had the right to authorize the use of its copyrighted film or excerpts therefrom. 17 U.S.C. § 301(a). And, so long as that use involved only duplication and incorporation in another work, no one but the copyright holder would have the right to authorize or refuse to authorize such a use. *Id.* Once the film is in the public domain, the rights of the copyright holder are lost and cannot be regained by anyone else, including the heirs of a deceased celebrity by operation of state law. *Id.; see e.g.,* 1 Melville B. Nimmer and David Nimmer, *Nimmer On Copyright,* § 2.03[G] (1993).

As the United States Supreme Court held in *Sears, Roebuck & Co. v. Stiffel Co.,* 376 U.S. 225, 232 (1964): "...a state may not, when an article is unpatented and uncopyrighted, prohibit the copying of the article itself or award damages for such copying..." This rule was aptly summarized in the companion case of *Compco Corp. v. Day-Brite Lighting, Inc.,* 376 U.S. 234, 237 (1964): "[W]hen an article is unprotected by a patent or a copyright, state law may not forbid others to copy that article."

This rule of preemption has been applied in California to bar claims of misappropriation under an unfair competition theory — essentially what is entailed in the right of publicity claim here — where public domain material is involved. In *Sammons & Sons v. Ladd-Fab, Inc.,* 138 Cal.App.3d 306, 311, 187 Cal.Rptr. 874, 877–878 (1982), the Court held:

> "The applicability of the *Sears* and *Compco* doctrine having been demonstrated, we turn to the question whether that doctrine is consistent with the continue recognition of misappropriation by copying of public domain matter as a basis for unfair competition claims. We conclude that, though such copying may be an element in an otherwise unlawful competitive scheme, unfair competition claims may not be based *solely* upon such copying."

See also Sinatra v. Goodyear Tire & Rubber Co.,435 F.2d 711, 717 (9th, Cir. 1970).

Other courts have similarly found that the exclusive federal right preempts equivalent state law rights, including right of publicity claims that are premised on a use identical to that encompassed by the Copyright Act. *Baltimore Orioles, Inc. v. Major League Baseball Players Assoc.*, 805 F.2d 663, 674–79 (7th Cir. 1986); *Motown Records Corp. v. George A. Hormel & Co.*, 657 F.Supp. 1236, 1240–41 (C.D. Cal. 1987).

The case now before the Court deals solely with the issue of copying use as amounting to a misappropriation. The Court below held that Respondent's allegations that Petitioner used the film clips for advertising and selling were without substance. Respondent has alleged no other act that would otherwise differentiate this claim from one solely involving the mere duplication and incorporation of the film clips in question in instructional materials. That use of public domain materials is permitted by the Copyright Act and, as a matter of federal preemption, cannot be inhibited by the overbroad interpretation of § 990 advanced by the Court below. 17 U.S.C. § 301(a).

B. The Present Section 990 Claim Is Barred by Section 990(n)'s Exception for Use Involving Film

As discussed above, California's statutory right of publicity cannot intrude upon uses that are otherwise the subject of copyright. In this regard, the California Legislature was careful in drafting § 990 to provide for an explicit and unqualified exception for the application of publicity rights to film unless the use is in "an advertisement or commercial announcement." As provided by § 990(n)(1):

> "This Section shall not apply to the use of a deceased personality's name, voice, signature, photograph, or likeness, in any of the following instances: (1) a . . .

> film . . . or television program, other than an advertisement or commercial announcement . . . ."

The use by Best Film of film clips in these instructional videotapes falls squarely within the express exceptions set forth on the face of the statute. This analysis applies whether the issue is mere use of the film clips themselves or whether instructional videotapes are considered within the exception in their entirety. Application of the exception here is even clearer because the District Court in this case has found that there was no use in "an advertisement or commercial announcement."

Nonetheless, despite the lack of any limiting language in § 990(n), the Court below has read that Section to apply only to "bibliographical works." *See* Minute Order dated November 19, 1993, page 2, n.1, appended hereto as Exhibit E. The court has never described how or why it reached this conclusion. There is no case authority supporting such an interpretation, nor does the Legislative history of § 990 shed any light on construing such a limitation to the § 990(n) exception. The exception set forth in § 990(n) should be found to apply here.

C. There Can Be No Right of Publicity Claim Absent a Showing of Use for Purposes of Advertising or Selling

Under settled case authority, the right of publicity — whether under § 990 as related to deceased celebrities, its companion statute California Civil Code § 3344 related to living persons or common law — has never been considered to be a *per se* rule of law. Instead, courts have always considered the context in which a use occurs to be essential. The necessary elements of a claim for a violation of the right of publicity require a commercial exploitation through an unauthorized or unpermitted use of a celebrity's likeness

directly connected to advertising or selling.[4] Thus, the unauthorized use of a celebrity's likeness on or in consumer products, goods or merchandise *(e.g.,* Michael Jordan's name on a basketball or his picture in an advertisement to sell Nike's) is plainly actionable because all elements are present: the use is unauthorized and its sole purpose is for advertising or selling a consumer product, *i.e.,* basketballs or sneakers. However, particularly where the use is in a protected medium of expression (such as a textbook, a documentary film or, as here, an instructional videotape), then the element of a direct connection with advertising and selling is critical. Accordingly, unauthorized use of a celebrity's likeness in a television or print advertisement is actionable, whereas the use of the same likeness in a textbook or other instructional material is not.

There simply is not a single case extending the right of publicity to mere use of a person's likeness in any form of media, be it books, magazines, films or videotapes. Quite to the contrary, it is a long-required element of a claim for statutory violation of California's right of publicity that a plaintiff must establish what is termed a "direct connection" between the alleged unpermitted use and "solicitation of purchases" or in the terms of Respondent's Complaint in the court below, "advertising and selling." *Eastwood v. Superior Court for Los Angeles Co.,* 149 Cal. App.3d 409, 420, 198 Cal.Rptr. 342, 348–349 (1983)(use must be directly connected to commercial exploitation); *Johnson v. Harcourt, Brace, Jovanovich, Inc.,* 43 Cal.App.3d 880, 896, 118 Cal.Rptr. 370, 381 (1974)(use must be directly connected to commercial exploitation). As one California court

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[4]See citations below. The only exception involves false stories about celebrities, which has no bearing here.

has stated concerning California's statutory right of publicity[5] as applied to living persons:

> "This statute protects the interest in identity by proscribing unauthorized use of another's name or likeness *on specific products or in connection with advertising and sale of services and products." Maheu v. CBS, Inc.*, 201 Cal.App.3d 662, 676, 247 Cal.Rptr. 304, 312 (1988) (emphasis added and citation omitted).

Significantly, the requirement of a direct connection between an unpermitted use and advertising or solicitation of purchases of a product was first articulated in a case, *Johnson v. Harcourt. Brace, Jovanovich,* involving a factual setting strikingly similar to the instant case. *Johnson v. Harcourt, Brace, Jovanovich,* 43 Cal.App.3d 880, 894, 118 Cal.Rptr. 370 (1974). In *Johnson,* the plaintiff complained of the mere use of his identity in a history textbook as violating his right of publicity. Discussing *Johnson* under both sections of California's right of publicity statutes (Sec-

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[5] While the court in *Maheu v. CBS, Inc.* was discussing § 3344 which applies the right of publicity to living persons, there is no distinction between § 3344 and § 990 for these purposes. Section 990 of the California Civil Code was enacted on September 30, 1984, to codify the common law right of publicity in California and to provide for the continuation of that right after the death of an individual whose persona was protected. A California statute protecting the right of publicity had originally been enacted in 1972 as Section 3344 of the California Civil Code. In 1984, California reacted to decisions limiting this right to living persons by enacting the parallel provisions of Section 990 for deceased celebrities. Section 3344 was amended at the same time so that its equivalent definition of the right of publicity, Section 3344(a), tracked the language enacted as Section 990(a). The only relevant distinction between the two right of publicity statutes is the inclusion in Section 990, the provision for the rights of deceased personalities applicable here, of the express exemption for uses in creative works including films under Section 990(n).

tions 3344 and 990), McCarthy's authoritative treatise, *The Rights of Publicity and Privacy,* states:

> "Under the 1972 version of § 3344, the California court of appeals held that the use of plaintiff's name and history in finding and returning a large sum of money as the basis for a lesson in a college English textbook was not a prohibited use under § 3344. The court found that such a use of plaintiff's identity was not for purposes of advertising or soliciting purchases of the textbook. The court noted that the plaintiff's name was 'only used as an educational tool in an English textbook' and 'was not a primary reason for the textbook; nor was it a substantial factor in the students' purchase of the book.' *This requirement of a 'direct connection' between the unpermitted use and a commercial purpose is an example of the general rule that mere 'incidental' use of identity, especially as part of the educational content of a book, is not the kind of unpermitted use of identity which triggers infringement of the Right of Publicity.* On the other hand, an unpermitted use which is used to 'attract the attention' of prospective buyers of defendant's product is clearly within both § 3344 and common law rights." § 6.4 [F][2] at p. 6-31 (emphasis added and footnotes omitted).

Based upon this same reasoning, the California Court of Appeal granted summary judgment in favor of a defendant in a case involving a claim that mere use of the likeness of famed surfer Mickey Dora in a documentary violated his publicity rights under § 3344. There, the Court specifically rejected the very argument that Respondent is asserting here — that any use of likeness amounts to a publicity right violation:

> "Though both celebrities and non-celebrities have the right to be free from the unauthorized exploitation of their name and likenesses, every publication of some-

> one's name or likeness does not give rise to an appropriation action." *Dora v. Frontline Video, Inc.*, 15 Cal.App.4th 536, 542, 18 Cal.Rptr.2d 790, 792 (1993).

The requirement of a direct connection between a use and advertising and/or selling recently has been held to be equally applicable to claims brought under § 990:

> "California Civ. Code Section 990 . . . applies by its language and by legal authority *only* to the exclusively commercial use of [the] persona in merchandise, advertising or endorsements." *Joplin Enter. v. Allen*, 795 F. Supp. 349, 351 (W.D. Wash. 1992) (emphasis added).

Like *Johnson* and *Dora*, *Joplin* is particularly instructive here because it involves mere use in a medium of expression — in Joplin a stage play concerning the late blues singer Janis Joplin. In the play, the persona of Joplin (*i.e.*, her name, image, and likeness) is the play's entire *raison d'etre*. Rejecting the § 990 claim by Joplin's devisees, the Court noted:

> "California Civ. Code § 990 . . . clearly contemplates examining the use of a deceased personality's name, voice, etc., in terms of the total context in which it appears, Where a use is for the purpose of advertising goods or services, it is prohibited. Identical use in the context of a play is protected."[6] *Id.*

The same result was reached by the Ninth Circuit in *Leidholdt v. L.F.P. Inc.*, 860 F.2d 890, 895 (9th Cir. 1988), *cert. denied*, 489 U.S. 1080, 109 S.Ct. 1532 (1989), involving the use of plaintiff's photograph in a magazine sold for profit — *Hustler* — which was held not to create a cause of

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[6]It bears noting that the *Joplin* Court went on to find, as Best Film urges here, that First Amendment concerns also barred any publicity claim. 795 F.Supp. at 352. *See* § D. below.

action for misappropriation in connection with a constitutionally protected expression of opinion. The present case is squarely in line with *Johnson* and the cases cited above with regard to the use in the videotapes at issue being beyond the scope of a right of publicity claim. Similarly, in *Eastwood v. Superior Court,* 149 Cal.App.3d 409, 417, 198 Cal.Rptr. 342, 347 (1983), the Court held that the direct connection needed to be established is an "additional requirement" for recovery on a right of publicity claim.

The requirement makes eminent good sense. If mere use of a likeness were actionable, every publication, be it a book, magazine, newspaper or videotape containing the photograph, name, voice, signature or likeness of a celebrity, would give rise to *per se* liability for violation of the right of publicity. The limitation provided by the advertising and selling requirement also has the collateral benefit of avoiding the problem of copyright preemption (*i.e.,* no claim based on mere duplication). At the same time, it allows an interpretation of the right of publicity which avoids First Amendment concerns that arise where only mere use is involved.

Precisely because a "direct connection" must be established, cases involving the right of publicity claim, with the sole exception of the "false story" cases cited below, require a showing of use for advertising and selling. In most publicity cases the connection is easily established in relation to some consumer product. *See, e.g., Motschenbacher v. R.J. Reynolds Tobacco Co.,* 498 F.2d 821 (9th Cir. 1974) (use in television advertisement of image of race car driver to sell Winston cigarettes); *Midler v. Ford Motor Co.,* 849 F.2d 460 (9th Cir. 1988) (use in television commercials of Bette Midler's voice to sell Ford cars); *Waits v. Frito-Lay Inc.,* 978 F.2d 1093 (9th Cir. 1992), *cert. denied,* U.S. , 113 S.Ct. 1047 (1993) (use in radio advertisement of Tom Waits voice to sell Frito-Lay junk food); *White v. Samsung*

Elec. Inc., 971 F.2d 1395 (9th Cir. 1992) *cert. denied*, ___ U.S. ___ 113 S.Ct. 2443 (1993) (use of Vanna White's image in print advertisements to sell videocassette recorders).

Where the use is in a medium of expression, as opposed to a consumer product, the burden is even higher because of First Amendment concerns — only if the use is predicated upon a false story created to attract the attention of a potential consumer may a right of publicity claim arise. *See e.g., Cher v. Forum Int'l, Ltd.*, 692 F.2d 634 (9th Cir. 1982), *cert. denied*, 462 U.S. 1120, 103 S.Ct. 3089 (1983) (knowing falsity in the use of Cher's image in advertising what was represented to be an "exclusive" to the readership of Penthouse's *Forum* as endorsing the magazine); *Eastwood v. Superior Court*, 149 Cal.App.3d 409, 198 Cal.Rptr. 342 (1983) (false cover story of "Love Triangle" supposedly involving Clint Eastwood, Sandra Locke and Tanya Tucker used to sell *National Enquirer*).

However, where a direct connection is *not* established, courts have not hesitated to reject a claim premised on the right of publicity. *See, e.g., Johnson v. Harcourt, Brace. Janovich, supra* (use of plaintiff's identity in textbook not actionable); *Leidholdt v. L.F.P., Inc.*, 860 F.2d 890 (9th Cir. 1988), *cert. denied*, 489 U.S. 1080, 109 S.Ct. 1532 (1989) (mere use of photo in Hustler, a magazine sold for profit, not sufficient); *Dora V. Frontline Video, Inc.*, 15 Cal.App.4th 536, 18 Cal.Rptr.2d 790 (1993) (summary judgment affirmed rejecting liability for mere use of surfer Mickey Dora's name and likeness in a "Frontline" television documentary); *Joplin Enter. v. Allen*, 795 F.Supp. 349 (W.D. Wash. 1992) (use of Janis Joplin's persona in biographical play does not result in a right of publicity claim under Section 990); *Brown v. Twentieth Century Fox Film Corp.*, 799 F.Supp. 166, 172-173 (D.D.C. 1992), *aff'd* without opinion, 15 F.3d 1159 (1994) (summary judgment

granted for defendant film company on common law right of publicity claim following from use in a movie of a short clip from a television performance by singer James Brown).

In sum, the entire weight of authority involving rights of publicity precludes extending a right of publicity claim to mere use without a showing of a direct connection to advertising and selling. Best Film submits that the Court should grant permission for this Appeal and declare that this body of law is applicable to this case.

D. If Mere Use of Public Domain Film Clips in Instructional Videotapes Is Actionable Under § 990, Such a Ruling Runs Afoul of Preeminent First Amendment Principles

The use here is in an educational medium and thus one entitled to full First Amendment protection. As noted in the previous discussion, where a use of name, image or likeness occurs in a protected medium of expression, First Amendment concerns further inhibit the scope that is to be afforded a right of publicity claim. McCarthy's treatise states:

> "The place and context of unpermitted use of personal identity are crucial. When a defendant is making unpermitted use of the name of a famous sports figure on a product like a coffee mug, a claim of first amendment immunity for conveying the 'message' — expressing admiration for that person and his or her accomplishments — rings somewhat hollow." McCarthy, *The Rights of Publicity and Privacy,* § 7.6[A] at p. 7-17.

The direct effect of the District Court's ruling is to reduce the videotapes at issue in this case to a "product" like the coffee mug in Professor McCarthy's illustration. But this case does not involve a consumer product such as a coffee mug, it involves a protected medium of expression. The distinction is decisive.

Under California law on the right of publicity, a clear line is drawn between commercial uses and media uses. Pure commercial uses *e.g.,* a celebrity's likeness on a coffee mug or T-shirt) are clearly subject to a right of publicity claim. Where the use, however, is reasonably related to the content of a medium of expression (*i.e.,* book, magazine, videotape or film), the First Amendment prevents a right of publicity claim.[7] This distinction between commercial uses and media uses was articulated by the California Supreme Court in the so-called *Lugosi* and *Valentino* cases. In *Lugosi* (the case that gave rise to the enactment of Section 990), the publicity claim centered upon the use of Bela Lugosi's likeness as Count Dracula on the sale of products such as toy pencil sharpeners, soap products and the like. *Lugosi v. Universal Pictures,* 25 Cal.3d 813, 851, 160 Cal.Rptr. 323, 347 (1979). The *Valentino* decision, on the other hand, concerned the use of silent movie star Rudolph Valentino's likeness in a fictional film. *Guglielmi v. Spelling-Goldberg Productions* ("*Valentino*"), 25 Cal.3d 860, 160 Cal.Rptr. 352 (1979). The two cases were decided simultaneously and are particularly instructive because of the clear demarcation made by the Court between a use for a *product* versus for a *medium of expression.*

The majority of the *Valentino* court, in finding that the use in *Valentino* was constitutionally insulated from a right of publicity claim, clearly articulated the fundamental difference between the two claims for purposes of the right of publicity. Significantly, in the present context, the California Supreme Court did so by defining what is meant by the term

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[7]The only exception would be for "false stories" — wholly inapplicable here.

"product" and how it is distinguishable from a protected medium of expression:

> "[T]he facts underlying *Lugosi v. Universal Pictures, supra,* are substantially different than those in the present case. *Lugosi* involved the use of Bela Lugosi's likeness in connection with the sale of such commercial products 'as plastic toy pencil sharpeners, soap products, target games, candy dispensers and beverage stirring rods.' (*Id.,* 160 Cal.Rptr. at p. 333, 603 P.2d at 435 (dis. opn.).) These objects, unlike notion pictures, are not vehicles through which ideas and opinions are regularly disseminated. (*See Hicks V. Casablanca Records, supra,* 464 F.Supp. at p. 430.) This case involves the use of a celebrity's identity in a constitutionally protected medium of expression, a work of fiction on film." *Guglielmi v. Spelling-Goldberg Productions,* 25 Cal.3d 860, 874-75, 160 Cal.Rptr. 352, 361 (1979).

Therefore, the *Valentino* court concluded that First Amendment concerns precluded a right of publicity claim regarding mere incorporation of Valentino's likeness in the film. The court further held that First Amendment concerns even prevented a claim for use of his likeness in advertising the film. The court stated:

> "A cause of action-for the appropriation of Valentino's right of publicity through the use of his name and likeness in respondents' film may not be maintained. The trial court properly sustained the demurrer and dismissed the complaint."
>
> *"A similar result is compelled for the use of Valentino's name and likeness in advertisements for the film.* That use was merely an adjunct to the exhibition of the film. It was not alleged that the advertisements promoted anything but the film. Having established that

> any interest in financial gain in producing the film did not affect the constitutional stature of respondents' undertaking, it is of no moment that the advertisement may have increased the profitability of the film. It would be illogical to allow respondents to exhibit the film but effectively preclude any advance discussion or promotion of their lawful enterprise. *Since the use of Valentino's name and likeness in the film was not an actionable infringement of Valentino's right of publicity, the use of his identity in advertisements for the film is similarly not actionable. Id.*, 25 Cal.3d 872-73, 160 Cal.Rptr. at 360 (emphasis added).

Courts since *Valentino* have consistently' hewed to its First Amendment distinctions, even where First Amendment content was questionable. *See e.g., Cher V. Forum Int'l, Ltd.*, 692 F.2d 634 (9th Cir. 1982); *Eastwood v. Superior Court*, 149 Cal.App.3d 409, 198 Cal.Rptr. 342 (1983) (both courts required a showing of falsity related to use after extensive discussion of First Amendment concerns). Indeed, even prior to *Valentino*, the *Johnson* court protected the commercial publication of instructional materials from a right of publicity claim. *Johnson v. Harcourt, Brace, Jovanovich, supra.* Of particular significance, since the *Valentino* decision, its distinction between uses on products versus medium of expression has been consistently upheld. *See Eastwood, Leidholdt, Maheu, Dora,* and *Joplin.*

Most recently, this distinction and deference to First Amendment concerns has been applied to § 990 in particular. In *Joplin*, although ruling that the claim was not actionable under § 990 because of the absence of any showing of a direct use for merchandising, advertising, or endorsement, the court nonetheless stated its conclusion

with respect to the "clear direction in which constitutional law points," namely that:

> " '[t]he protection of the right of free expression is so important that we should not extend *any* right of publicity . . . to give rise to a cause of action against publication of a . . . work about a deceased person.' " *Joplin Enter. v. Allen*, 795 F. Supp. at 352 (quoting *Frosh v. Grosset & Dunlap Inc.*, 75 A.D.2d 768, 427 N.Y.S.2d 828, 829 (App. Div. 1980)).

It bears noting that the category of persons who would be entitled to make such claims would not be limited merely to entertainers such as Fred Astaire, Charlie Chaplin or Elvis, it would also potentially include historical figures such as Dr. Martin Luther King, Jr.[8]

Of course, in this case where it is established that the use at issue is not only in a medium of expression but also educational in content (*e.g.*, instructional videotapes), the use is plainly at the core of the First Amendment and constitutionally immune from any claim:

> "If information on 'public issues' is within the core of strong first amendment protection and immune from appropriation privacy and Right of Publicity liability, then educational and scholarly uses of a person's identity clearly must also be immune. Of course, the qualification must be that there is a reasonable relationship between the person's identity and the educational

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[8]Thus, while the right of publicity has been extended to an historical figure such as Dr. King, *Martin Luther King Center v. American Heritage Products, Inc.*, 250 Ga. 135, 296 S.E.2d 697, 216 U.S.P.Q.(BNA) 711 (1982) (extending the right of publicity to unauthorized merchandise — plastic busts — containing the likeness of Dr. King), it is unimaginable that the right of publicity could be extended to mere use of Dr. King's name and likeness in a protected medium of expression.

> or scholarly message. Since students identify with a known person, the use of the name or photo of a celebrity in a text book to illustrate a lesson has real educational value. The textbook is more saleable, not because it contains the name or photo of a celebrity per se, but because that use makes the book a more effective educational tool. Certainly people active in the spheres of politics, economics, science and the arts must expect their identities to be used without payment to illustrate the content of books, articles and films which teach or comment upon those fields." McCarthy, *The Rights of Publicity and Privacy Section,* § 8.8 [B][3] at p. 8-48.

The considerations apply with equal force here. And it should be noted in this regard that, contrary to what the court below has implied, the fact of a "commercial use" (*i.e.*, sale of the videotapes for a profit) has absolutely no bearing on Respondent's right of publicity claim any more than if the claim was being made against *The New York Times* or Harcourt, Brace, and Jovanovich. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501–502, 72 S.Ct. 777, 780 (1952). The only inquiry on a right of publicity analysis under the First Amendment is whether the use is reasonably related to the content of the expression. *Eastwood v. Superior Court*, 149 Cal.App.3d 409, 419, 198 Cal.Rptr. 342, 348 (1983). Indeed, this requirement is codified in California Civil Code § 990(k). In this case, there can be no *bona fide* question that the use was directly related to the content of the instructional videotapes themselves. A brief glimpse of Fred Astaire dancing in the context of an instructional videotape teaching the viewer to dance "the Fred Astaire Way" bears an obvious relationship to the content of the instructional materials. Inspirational, aspirational and instructive in themselves, the film clips underscore the essential premise with which Fred Astaire started the Fred Astaire Dance Studios in the first place: "Learn to dance

like me." Images of Fred Astaire dancing bear an obvious relationship to the videotapes' instructional content. It would be plainly contrary to the most fundamental First Amendment precepts to allow the operation of § 990 to enable the heirs of a deceased celebrity to effectively censor the videotapes' content. But that is precisely the effect of the lower Court's ruling.

As the discussion above demonstrates, therefore, the context in which the public domain film clips were used is plainly one protected by the First Amendment from any right of publicity claim. This claim to immunity is only strengthened by Respondent's own Section 990 Registration. In that Registration, Respondent exempts from her claim to Section 990 rights "the right to franchise and cause to be operated, dance studios under the name and image[9] of Fred Astaire." As the Court below has found, the videotapes at issue are properly part of the operation of the Fred Astaire Dance Studios.

Accordingly, under plainly established case law, the mere use of public domain film clips of Fred Astaire in instructional videotapes is immune from liability under the right of publicity as a matter of constitutional prerogative. First Amendment considerations stand, therefore, as a separate and distinct legal basis upon which Respondent's right of publicity claims are precluded.

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[9]"Image" is defined as "an imitation or representation of a person or thing, drawn, painted, photographed, etc." *Webster's New World Dictionary*, Third College Edition (1988).

V.
DETERMINATION OF THE CONTROLLING ISSUE OF LAW IN THIS CASE WILL MATERIALLY ADVANCE THE TERMINATION OF THE LITIGATION

As the foregoing discussion demonstrates, there is a significant difference of opinion with regard to the rule of law enunciated by the District Court. It is equally clear that the determination of this issue at this juncture will materially advance the termination of this litigation. Indeed, determination of the issue by this Court is effectively case dispositive. Either this Court will refuse to sanction the unprecedented *per se* application of § 990 and end this case in this Court, or a new legal standard will be enunciated in which the parties' respective rights will be definitively settled.

Unless this important issue is determined by this Court, it will lead the Parties into further potentially needless proceedings in this case that will be so uncertain in their scope and dimension as to make resolution of this case by settlement impossible and will only necessitate a further appeal of the question presented in precisely the form in which it is presented here. Therefore, Petitioner submits that it does not make sense to force the Parties to go through the great costs and expense of a damages trial — which Petitioner estimates will take at least a week of trial time in addition to pretrial preparation, expert depositions, etc. Again, because of the unprecedented nature of the ruling of the Court below, the uncertainty that the Parties will face in such a damages phase will require an appeal by either Party as a matter of necessity.

At this juncture, it should also be noted that the Parties have expended a significant amount of resources over years of litigation. While much of this litigation has involved Ronby Corporation and Respondent arguing about the scope

of license agreements, trademark rights and issues related to the operation of the Fred Astaire Dance Studios with which Petitioner has no involvement, Respondent will undoubtedly claim a broad right to all attorneys' fees and costs arising from the § 990 claim that is now the focus of the litigation. These attorneys' fees and costs therefore have become a significant bone of contention, if not the major bone of contention in this case. Resolution of the issue now before this Court will fully and finally determine that question at least in terms of the Parties' rights and liabilities. This further demonstrates that hearing this appeal at this juncture will materially advance this litigation and avoid needless duplication of resources where it is inevitable that this case, which now involves only the controlling question presented here, will have to be decided by this Court in any event.

VI.
CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that Petitioner be entitled to pursue an immediate appeal in this case.

Dated: April 7, 1994

Respectfully submitted,
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No. 94-80135
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BEST FILM VIDEO CORP., a corporation,
Petitioner,
v.
ROBYN ASTAIRE, an individual,
Respondent.

ANSWER IN OPPOSITION TO PETITION FOR PERMISSION TO APPEAL UNDER 28 U.S.C. 1292(b)

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CV 90-0261 KN

(Hon. David V. Kenyon and Hon. Irving Hill)

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Pursuant to Fed. R. App. P. 5(b), Respondent Robyn Astaire ("Mrs. Astaire") respectfully submits this answer in opposition to the petition for permission to appeal under 28 U.S.C. § 1292(b) (the "Petition") filed by Best Film & Video Corporation ("Best").

I.
INTRODUCTION AND SUMMARY OF ARGUMENT

In its Petition, Best seeks an immediate appeal from the district court's orders of March 8, 1994, July 17, 1991, and November 26, 1990 (the "Orders"), establishing Best's liability under California Civil Code Section 990. Specifically, Best seeks interlocutory review of the district court's determinations that Best's use of Fred Astaire's likeness in videotapes violated Section 990; that Best's conduct is not protected by the First Amendment; and that Section 990 is not preempted by the federal Copyright Act. Best's Petition should be denied, because Best has failed to meet its burden of demonstrating that an extraordinary, immediate appeal from the Orders is appropriate under the standards set forth in 28 U.S.C. § 1292(b).

First, Best has failed to establish that an immediate appeal would "materially advance the ultimate termination" of this litigation, as required by Section 1292(b). To the contrary, Best's Petition would, if granted, serve to ensure that the district court proceedings in this case (which have already lasted more than five years) would be delayed for at least an additional 12 – 18 months pending briefing, argument, and decision in this court. This is so because regardless of this court's disposition of the issues raised by Best, further proceedings would be required in the district court, and further appeals to this court would almost certainly ensue. on the other hand, if this court were to deny the Petition, this case could be tried in a few days in the district

court, and all relevant issues could then be presented to this court in a single appeal from a final judgment. In short, there is little to be gained from forcing this court and Mrs. Astaire to undergo the burden, inconvenience, and considerable delay that would result from an interlocutory appeal, and thus there is no basis for concluding that immediate review would "materially advance the ultimate termination" of this case.

In addition, Best has failed to show that "there is substantial ground for, difference of opinion" over the questions on which Best seeks interlocutory appeal. 28 U.S.C. § 1292(b). The district court's rulings accord with settled law and with the language, purpose, and legislative history of California Civil Code Section 990. Best is unable to cite any persuasive authority to the contrary, and thus its Petition should be denied on that ground as well.

Finally, the Petition should be denied as a matter of this court's discretion because this case manifestly does not present the sort of exceptional circumstances that are generally required before this court will accept such interlocutory review under § 1292(b).

II.
STATEMENT OF THE CASE

A. Factual Background

Respondent Mrs. Astaire is Fred Astaire's widow. She has succeeded to all rights in the name, voice, signature, photograph, likeness, and general right of publicity in Fred Astaire's persona, including all rights under California civil Code Section 990. She was granted those rights under the terms of the Fred Astaire Trust, dated December 31, 1985. *See* Plaintiff's Separate Statement of Undisputed Facts and Conclusions of Law ("Separate Statement"), No. 2. In addition, she obtained all of Fred Astaire's show business

rights pursuant to a written agreement dated April 1988, which was signed by all of the trustees and beneficiaries of the Fred Astaire Trust. Separate Statement, No. 3. Mrs. Astaire has complied with the statutory registration requirements contained in California Civil Code Section 990(f) by registering her claim with the California Secretary of State. Separate Statement, No. 4.

Petitioner Best is a New York corporation, engaged in the business of manufacturing, producing, marketing, distributing and selling prerecorded video cassettes throughout the United States. Separate Statement, No. 7. Ronby Corporation ("Ronby") is a Florida corporation which, at the time this lawsuit was initiated, operated the Fred Astaire Franchised Dance Studios pursuant to a January 15, 1965 written license agreement and earlier written agreements with Fred Astaire. Separate Statement, No. 5. The Fred Astaire Franchised Dance Studios provide dancing instruction to their students. Separate Statement, No. 6.

Since October of 1989, more than two years after Mr. Astaire's death, Best has been distributing video cassettes known as the "Fred Astaire Dance Series," with individual titles "Swing," "Top 40," "Latin Dancing," "Ballroom," and "Country Western Dancing" (the "Video Cassettes"). Separate Statement, No. 8. The Video Cassettes contain photographs of Fred Astaire as well as film clips of performances of Fred Astaire taken from two of his films, "Royal Wedding" and "Second Chorus," which were released in 1951 and 1941, respectively. Separate Statement, No. 9.

Best produced, distributes, advertises and markets the Video Cassettes outside the Ronby dance schools. Separate Statement, No. 10. As part of its marketing campaign, Best showed the Video Cassettes in the summer of 1989 at a trade show attended by 100,000 of its customers, including its retail buyers and others. Separate Statement, No. 11. In

addition, Best gave away many copies of the Video Cassettes as promotional items to its retail buyers, various media and others. Separate Statement, No. 12.

Best concedes that it never sought or obtained permission to utilize the film clips of Fred Astaire in the Video Cassettes. Separate Statement, No. 14. Nor did Best obtain permission to utilize the many photographs of Mr. Astaire in the Video Cassettes. Separate Statement, No. 15.

B. Procedural History

Mrs. Astaire filed this action against Best and Ronby in December 1989, shortly after Best began distributing the Video Cassettes containing the film clips and photographs of Fred Astaire. Mrs. Astaire asserted claims against Best for misappropriation of her publicity rights under California Civil Code Section 990; trademark, trade name, and service mark infringement; unfair competition; and violation of the Lanham Act, 15 U.S.C. § 1125(a).[1]

In late 1990, the parties filed cross-motions for summary judgment or partial summary judgment. On November 26, 1990, the district court denied those motions without prejudice to their renewal before trial. *See* Minute Order dated Nov. 26, 1990 (attached hereto as Exhibit A).

On July 17, 1991, the district court granted summary judgment for Best and Ronby on Mrs. Astaire's trademark and unfair competition claims. *See* Order re Motions for Summary Judgment, filed July 17, 1991 ("7/17/91 Order"), reproduced at Petition, Exh. C, at 4. The court also ruled that Mrs. Astaire's right-of-publicity claim under California Civil Code Section 990 was not preempted by the

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[1] Mrs. Astaire asserted the same claims, as well as a claim for breach of contract, against Ronby. Mrs. Astaire and Ronby entered into a settlement agreement in July 1993, however, and Ronby is no longer a party to this litigation.

federal Copyright Act (*id.* at 2, 3), and that the production and marketing of the Video Cassettes under Fred Astaire's name did not, standing alone, constitute a violation of Mrs. Astaire's right of publicity. *Id.* at 2; *see also* Order of March 8, 1994, reproduced at Petition, Exh. D ("3/8/94 Order"), at 2.

Thereafter, the district court set a trial date of February 15, 1994, and the parties filed new summary judgment motions. On March 8, 1994, the court granted summary judgment for Mrs. Astaire, ruling that Best had violated her rights under Section 990 by using Fred Astaire's likeness "on or in products," namely, the Video Cassettes. 3/8/94 Order at 2 – 7. The court granted summary judgment for Best on Mrs. Astaire's claim that Best had violated her rights under section 990 by using the film clips and photographs of Fred Astaire for purposes of advertising or selling, or soliciting purchases of, products. *Id.* at 7 – 9. The court rejected Best's claims that Fred Astaire had waived any right to control the use of his likeness and that the First Amendment barred imposition of liability on Best in the circumstances of this case. *Id.* at 9 – 2.

On March 30, 1994, the district court certified its orders of November 26, 1990, July 17, 1991, and March 11, 1994, for interlocutory appeal under 28 U.S.C. § 1292(b), and stayed all proceedings in the district court. *See* Order of March 30, 1994, reproduced at Petition, Exh. A ("3/30/94 Order"). Best thereafter filed its Petition seeking leave to appeal. Mrs. Astaire did not seek leave of this court to obtain interlocutory review of any rulings of the district court.

III.
ARGUMENT

Best bears the burden of demonstrating that exceptional circumstances justify a departure from the basic policy of

postponing appellate review until after the entry of final judgment. *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 475 (1978). First, Best must persuade this court that each of the certification requirements of 28 U.S.C. § 1292(b) has been met. *In re Cement Antitrust Litigation,* 673 F.2d 1020, 1026 (9th Cir. 1982), *aff'd sub nom. Arizona v. Ash Grove Cement Co.,* 459 U.S. 1190 (1983). These requirements are threefold: (1) the challenged order of the district court must "involve[ ] a controlling question of law"; (2) there must be "substantial ground for difference of opinion" with respect to that question; and (3) it must be shown that "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).

Second, in addition to satisfying each of the statutory requirements, Best must demonstrate that this court should, in the exercise of its discretion under Section 1292(b), depart from the strong federal policy against piecemeal appeals: "§ 1292(b) is to be applied sparingly and only in exceptional cases." *United States v. Woodbury,* 263 F.2d 784, 788 n.11 (9th Cir. 1959). *See Coopers & Lybrand,* 437 U.S. at 475 (only " 'exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment' "); *In re Cement Antitrust Litig.,* 673 F.2d at 1026 (noting that, even if petitioner satisfies the requirements of Section 1292(b), "[t]he second step in our analysis is . . . to decide whether, in the exercise of the discretion granted us by the statute, we want to accept jurisdiction").

Best has failed to establish that this proposed appeal satisfies the certification requirements set forth in Section 1292(b). Moreover, even if Best could satisfy those requirements, the Petition would nonetheless lack merit, because Best cannot demonstrate the existence of "exceptional circumstances" justifying the exercise of this court's

discretion to authorize an interlocutory appeal. Best's Petition should therefore be denied.

A. An Immediate Appeal Will Not "Materially Advance The Ultimate Termination" Of This Litigation

Section 1292(b) permits an interlocutory appeal only when immediate appellate review "may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). For three reasons, Best cannot meet its burden of demonstrating that its proposed interlocutory appeal satisfies this statutory requirement.

1. The Question On Which Best Seeks Interlocutory Appeal Cannot Dispose Of This Case

In the first place, Best is simply wrong in asserting that determination of this attempted interlocutory appeal would be "effectively case dispositive." Petition at 33. Indeed, that assertion is belied by Best's admission (*id.* at 34) that the issue of attorney's fees is "a significant bone of contention, if not the major bone of contention in this case." Obviously, if the issue of attorney's fees — an issue that is not presented on this interlocutory appeal — is "the major bone of contention in this case," this court cannot dispose of the case on interlocutory review no matter how it decides the question that Best seeks to raise on this appeal.

Moreover, interlocutory review at this stage of the case could not even dispose of the merits of this litigation. As is made plain by Best's phrasing of the question presented by this interlocutory appeal, Best is asking this court to address its statutory and constitutional arguments on the assumption that "there is no use [of Fred Astaire's likeness] for advertising and selling the videotape." Petition at 10. That assumption is based on the district court's rejection of Mrs. Astaire's claim in her summary judgment papers that

Best used the film clips and photographs for purposes of advertising, selling, or soliciting purchases of the Video Cassettes. *See* 3/8/94 Order at 7 - 9.

Mrs. Astaire respectfully disagrees with the district court's ruling in that regard, and reserves the right to challenge it on appeal from a final judgment in this case.[2]

Thus, even in the unlikely event that this court were to agree with Best's legal arguments on this interlocutory appeal, it could not finally resolve Mrs. Astaire's right-of-publicity claim under California Civil Code Section 990. Rather, at least one additional appeal — and potentially a

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[2]Mrs. Astaire presented substantial evidence demonstrating that Best used the film clips and photographs of Fred Astaire for the purpose of selling and advertising, and soliciting purchases of, Best's products. That evidence included the following: (1) Best's decision to include the film clips and photographs in the Video Cassettes to enhance their commercial attractiveness; (2) Best's admission that the use of the clips and photographs was not intended to "add to the teaching content of these videotapes" but was merely "ornamental"; and (3) Best's president's deposition testimony that the Video Cassettes were shown at a trade show and given away for promotional purposes to retail buyers, various media, and others. Although Mrs. Astaire may well challenge the district court's ruling in this regard in a later appeal, she has not sought leave to raise the issue at this time under Section 1292(b), and the time for seeking such leave has now expired. 28 U.S.C. § 1292(b); Fed. R. App. P. 5(a). Thus, this Court would have no opportunity to address this issue even if Best were allowed to proceed with an interlocutory appeal. *See Luria Steel & Trading Corp. v. Ogden Corp.*, 484 F.2d 1016, 1023 - 24 (3d Cir. 1973) (non-appealing party cannot obtain interlocutory appellate review of unfavorable rulings of district court), *cert. denied*, 414 U.S. 1158 (1974). Of course, the fact that Mrs. Astaire has not sought leave to raise this issue now does not in any way limit her right to raise the issue on appeal from any final judgment that may be entered in this case. *See Balla v. Idaho State Board of Corrections*, 869 F.2d 461, 467 - 68 (9th Cir. 1989) (where party declines to utilize available opportunity for seeking interlocutory appellate review of district court order, the order " 'merges in the final judgement and may be challenged in an appeal from that judgment' ").

trial as well — would be required before that claim could be resolved.[3]

Likewise, if this court were to affirm the district court's rulings, a remand for a trial on damages would be required, and Best (or, possibly, Mrs. Astaire) would presumably bring yet another appeal upon entry of final judgment. Thus, there is no possibility that an interlocutory appeal could result in final resolution of the merits of Mrs. Astaire's right-of-publicity claim.[4]

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[3]Moreover, the district court did not resolve all of Mrs. Astaire's Section 990 claims. In particular, the district court declined to address the question whether Best's use of the photographs — as distinct from the film clips — constitutes a separate violation of Section 990, as Mrs. Astaire has alleged from the beginning of this lawsuit. *See* Complaint, ¶ 8; 3/8/94 Order at 3 n.1 ("The Court need not consider the significance of the photos in its analysis of the 'on or in' language of § 990, of course, because the presence of the film clips is itself adequate for a finding of liability."). This issue would require resolution on remand, however, if this court were to permit interlocutory review and agree with one or more of Best's arguments on appeal.

[4]In addition, Mrs. Astaire reserves the right to seek appellate review of any unfavorable final judgment that may be entered in the district court with respect to her claims against Best for trademark, trade name, and service mark infringement; unfair competition; and violation of the Lanham Act, 15 U.S.C. § 1125(a). Those issues were resolved against her on summary judgment by the district court, but that court has not yet entered final judgment with respect to those claims, which present substantial issues for appeal. For example, the district court rejected Mrs. Astaire's Lanham Act claim on the ground that Mrs. Astaire "does not appear to be a competitor of" Best (7/17/91 order at 3); the Ninth Circuit has made clear, however, that a plaintiff in the position of Mrs. Astaire need not be a competitor of the defendant in order to assert a Lanham Act claim. *See Waits v. Frito-Lay Inc.*, 978 F.2d 1093, 1109 - 10 (9th Cir. 1992), *cert. denied*, 113 S.Ct. 1047 (1993). Of course, these issues would not be before this Court on Best's interlocutory appeal, and thus there would be no opportunity for this court to resolve them in the current posture of the case.

2. Interlocutory Appeal Is Inappropriate Because This case Is Almost Ready For Trial And All District Court Proceedings Could Be Completed With Little Additional Burden On The District Court

It is settled law that certification of an interlocutory appeal under Section 1292(b) is inappropriate where the case has progressed to such a point that proceedings in the district court could be concluded without unduly burdening that court. Thus, in *United States v. Woodbury,* this court observed that "Section 1292(b) was intended primarily as a means of expediting litigation by permitting appellate consideration *during the early stages of litigation* of legal questions which, if decided in favor of the appellant, would end the lawsuit." 263 F.2d at 787 (emphasis added) (footnote omitted). Similarly, this court has made clear that Section 1292(b) certification is available only "in extraordinary cases where decision of an interlocutory appeal might avoid *protracted and expensive litigation.*" *United States Rubber Co. v. Wright,* 359 F.2d 784, 785 (9th Cir. 1966) (emphasis added) (footnote omitted); *see Robbins Co. v. Lawrence Manufacturing Co.,* 482 F.2d 426, 429 (9th Cir. 1973) (same).

This case is no longer in its "early stages." To the contrary, this case has been proceeding since 1989, and all discovery, except expert depositions and limited damage discovery, has been completed. Indeed, as late as January of this year, the trial was scheduled to begin on February 15, 1994, and thus Mrs. Astaire has already prepared her pretrial documents (including her memoranda of contentions of fact and law, motions in limine, exhibit and witness list, jury instructions and pre-trial conference order), and it is more than likely that Best has done the same.[5]

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[5] Indeed, on January 6, 1994, Best and Mrs. Astaire agreed that both parties' memoranda of contentions of law and fact, motions in limine,

Nor would authorization for an interlocutory appeal serve to "avoid protracted and expensive litigation" in the district court.[6] Even Best suggests that the issue of damages — the only issue currently remaining for trial — could be tried in a week (Petition at 33), and the limited nature of that issue makes it far more likely that the damages phase of this case could be presented to a jury in only two or three days.

Even assuming *arguendo* that a trial on damages would take as long as a week, there is no reason to permit Best to obtain interlocutory review only of a portion of the case at this late stage in proceedings. As one leading treatise observes, "[i]f trial of the case can be had in a few days, the possibility of saving relatively small amounts of trial court time is not thought sufficient to justify immediate appeal." 16 C. Wright, A. Miller, E. Cooper, & E. Gressman, *Federal Practice & Procedure* § 3930, at 163 (1977). *See also Kraus v. Board of County Road Commissioners,* 364 F.2d 919, 922 (6th Cir. 1966) (Section 1292(b) "was not intended to authorize interlocutory appeals in ordinary suits for personal injuries or wrongful death that can be tried and disposed of on their merits in a few days").[7] The mere

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and the joint exhibit list would be due five business days after entry of the district court's order on the motions for summary judgment. It is thus apparent that the parties were operating on the assumption that a trial was imminent.

[6]While expert depositions have yet to be taken, the parties have discussed limiting each side to two experts, and have acknowledged that each of the depositions will most likely last no longer than two hours. Similarly, while Mrs. Astaire has agreed to further document production, the scope of such production is extremely limited, and will result in the production of no more than a handful of documents. For these reasons, there is no reason to believe that outstanding discovery cannot be completed in the next one to two months — at the very latest.

[7]In *Laverne v. Corning,* 316 F. Supp. 629, 639 (S.D.N.Y. 1970), the court denied the defendant's application for permission to seek interlocutory review of the district court's order granting summary judgment for

possibility that the district court might be able to avoid a few days of trial cannot justify interrupting the orderly progress of this litigation and imposing on this court the burden of deciding an additional appeal involving issues that may ultimately be irrelevant to the final disposition of this case.

3. Immediate Appeal Would Not "Materially Advance The Ultimate Termination Of The Litigation" Because It Would Substantially Delay The District Court's Resolution of The Case

Yet another reason for concluding that an interlocutory appeal would not "materially advance the ultimate termination" of this litigation is the fact that an interlocutory appeal would substantially delay the district court's final resolution of this case. This court has made clear that interlocutory appeal is inappropriate where the appeal probably would not be decided before the trial could be completed. In *Shurance v. Planning Control Intern., Inc.*, 839 F.2d 1347, 1348 (9th Cir. 1988), the court expressly held that an interlocutory appeal would not "materially advance" termination of the case because "an interlocutory appeal might well have the effect of delaying the resolution of [the] litigation, for an appeal probably could not be completed before" the scheduled trial date. *Accord Kraus v. Board of County Road Commissioners,* 364 F.2d at 922; 16 C. Wright, et al., *Federal Practice & Procedure* § 3930, at 165 – 66 (fact that interlocutory appeal "might well contribute to further delay" is a "good ground for refusing to certify or accept an appeal"). The possibility that an interlocutory appeal will

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plaintiffs on the issue of liability. The court explained that "since the only issue remaining is the determination of the quantum of damages to be awarded plaintiffs, which apparently will not involve expensive and protracted litigation, there is little reason to believe that permitting an appeal from this Court's decision will '*materially* advance the ultimate termination of the litigation.' " *Id.* (footnote omitted). *Laverne's* reasoning is equally applicable here.

delay the ultimate disposition of the case is a "particularly strong ground for denying appeal if certification is sought from a ruling made shortly before a trial expected to be brief." *Id.* § 3930, at 166.

As pointed out above, the damages phase of this case could be tried well before this court would receive briefs on, much less rule on, an interlocutory appeal. Even assuming the trial will last one week, this litigation will still be resolved much sooner if allowed to proceed to trial. The median time interval in the Ninth Circuit between the filing of a notice of appeal and final determination is approximately 15 months. *Annual Report of the Director of the Administrative Office of the United States Courts* 151 (1992). Therefore, even a one-week trial (for which no more than two months would be needed to prepare) could be concluded long before this court would have had the opportunity to address the questions on which Best seeks interlocutory review.

For all the foregoing reasons, this case clearly does not fall within the category of "protracted" and "exceptional" litigation for which Section 1292(b) provides an interlocutory appeal, and Best has not carried its burden of proving that an immediate appeal would "materially advance the ultimate termination" of this litigation. This court should therefore deny Best's Petition.

B. The Challenged District Court Rulings Are Plainly Correct And Are Not Subject To "Substantial" Grounds For Difference Of Opinion

Even if Best could demonstrate that interlocutory review of the questions it seeks to raise would materially advance the ultimate termination of this case, interlocutory review under Section 1292(b), would still be unavailable, because Best has failed to meet its burden of showing that there is a "substantial ground for difference of opinion" about the

correctness of the district court's Orders. The rulings of the district court at issue in this case are correct, and thus there is no basis for interlocutory review under Section 1292(b).

1. There Is No Substantial Ground For Difference of Opinion With Respect To The District Court's Ruling On Preemption Under The Copyright Act

Best's first contention (Petition at 11–14) is that the district court erred in holding that Mrs. Astaire's statutory right of publicity is not preempted by the federal Copyright Act, 17 U.S.C. § 301(a).[8] In support of that contention, Best relies primarily on *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964), *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964), and their progeny. What Best ignores, however, is the fact that the Supreme Court has since retreated from the "broad pre-emptive principle" of *Sears* and *Compco*. *See Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1099 (9th Cir. 1992) (discussing decision in *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989)), *cert. denied*, 113 S. Ct. 1047 (1993).

Moreover, Best neglects to point out that this court has already rejected arguments analogous to the one that Best seeks to raise here. *See Waits*, 978 F.2d 1099 – 100; *Midler v. Ford Motor Co.*,849 F.2d 460, 462 (9th Cir. 1988).[9] In *Waits*, for example, this court noted that the legislative history of the Copyright Act reveals Congress's intent that

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[8] Best's preemption argument relates solely to the use of the film clips. Best does not and cannot contend that all of the photographs of Fred Astaire included in the Video Cassettes are in the public domain, and thus Best's preemption argument provides no defense to Mrs. Astaire's claim regarding Best's use of the photographs. Mrs. Astaire's claim in that regard, of course, has yet to be decided. See *supra* at 10 n.3.

[9] Other courts have reached the same conclusion. *See, e.g., Factors Etc., Inc. v. Pro Arts Inc.*, 496 F. Supp. 1090, 1100 (S.D.N.Y. 1980), *rev'd on other grounds*, 652 F.2d 278 (2d Cir. 1981); *Price v. Hal Roach Studios, Inc.*,400 F. Supp. 836, 842–43 (S.D.N.Y. 1975).

the right of publicity and similar state-law causes of action "'remain unaffected [by the Copyright Act] as long as th[os]e causes of action contain elements, *such as an invasion of personal rights* . . . that are different in kind from copyright infringement.'" 978 F.2d at 1100 (emphasis added) (citation omitted). Here, as in *Waits*, the right-of-publicity claim "is one for invasion of a personal property right," and thus it is not preempted. *Id.*[10]

2. There Is No Substantial Ground For Difference Of Opinion With Respect To The District Court's Interpretation Of Section 990(n)(1)

Best next contends that the district court erred in rejecting Best's defense based on California Civil Code Section 990(n)(1), which provides that Section 990 "shall not apply to the use of a deceased personality's . . . likeness, in . . . [a] . . . film . . . or television program, other than an advertisement or commercial announcement . . ."[11] That

[10] Best appears to contend (Petition at 14) that the preemption analysis in this case is affected by the district court's ruling that Best did not use the film clips or photographs for purposes of advertising or solicitation. Best does not point to any basis for that contention, however. In any event, as noted above, Mrs. Astaire believes that the district court erred in rejecting the evidence of use in advertising, selling, and solicitation, and she reserves the right to seek appellate review of that ruling after entry of final judgment. Thus, the issue as framed by Best may never require decision by this court.

[11] It is open to question whether this court would have jurisdiction to consider the Section 990(n)(1) issue on an interlocutory appeal. Jurisdiction under 28 U.S.C. § 1292(b) is "confined to the particular order appealed from," and thus "'the court of appeals will not consider matters that were ruled upon in other orders.'" *United States v. Stanley*, 483 U.S. 669, 677 (1987) (citation omitted). While Judge Hill, who initially presided over this case, did indicate a tentative view with respect to the Section 990(n)(1) issue at the summary judgment hearing on November 26, 1990 (*see* Petition, Exh. B, at 29 (declining "at least at this movement [sic]" to read Section 990(n) as Best urges), he did not

contention ignores the fact that Best used the film clips and photographs at issue in this case in videotapes, which are neither "film[s]" nor "television program[s]" within the express language of the statute. When the California Legislature intended to include videotapes within the scope of other terms used in Section 990, it did so expressly. *See* Cal. Civ. Code § 990(i) (defining "photograph" to include "any *video tape* or live television transmission") (emphasis added).

In any event, even if videotapes were subject to the provisions of Section 990(n)(1), Best's argument would lack merit. Although the California courts have not yet had occasion to address the issue, leading commentators have concluded that Section 990(n)(1) was intended to exempt "biographies, or accounts from events in the lives, of deceased personalities . . ." Weinstein, *Commercial Appropriation of Name or Likeness Revisited,* 22 Bev. Hills Bar J. 192, 214 (1988); *see also* J.T. McCarthy, *Rights of Publicity & Privacy* § 6.4[F][3][b] (1994). That interpretation is plainly correct; as the district court indicated, Best's contrary interpretation would eviscerate the cause of action recognized in section 990(a). *See* 11/19/93 Order at 2 n.1. The district correctly harmonized subsections (a) and

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purport to resolve that issue in his November 26, 1990, minute order (attached hereto as Exhibit A), and instead indicated that the denial of Best's summary judgment motion was "without prejudice to similar motions" made later. Judge Kenyon expressly rejected Best's Section 990(n)(1) defense in a minute order dated November 19, 1993 ("11/19/93 Order") (reproduced at Petition, Exh. E, at 2 n.1), but the district court did not certify that order for interlocutory appeal under 28 U.S.C. § 1292(b). 3/30/94 Order at 1. To be sure, the district court also referred to the Section 990(n)(1) issue in its 3/8/94 Order (which the court did certify for interlocutory appeal), but only to indicate that the court had "already expressed its view" on that subject. 3/8/94 Order at 10 n.8.

(n)(1), while Best would ask this court to excise a critical part of the former from the statute.[12]

3. There Is No Substantial Ground For Difference Of Opinion With Respect To The District Court's Interpretation Of Section 990(a)

Section 990(a) imposes liability on "[a]ny person who uses a deceased personality's name, voice, signature, photograph, or likeness, in any manner, *on or in products,* merchandise, or goods, *or for purposes of advertising or selling, or soliciting purchases* of, products, merchandise, goods, or services, without prior consent . . ." Cal. Civ. Code § 990(a) (emphasis added). The plain, unambiguous language of that provision requires rejection of Best's claim that the use of a celebrity's likeness "on or in products" is not actionable unless the use is "directly connected to advertising or selling." Petition at 16.[13] In effect, Best seeks to read out of the statute the cause of action for use "on or in products," but the statute's text and legislative history, as well as

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[12]Once again, Best's argument in this regard rests in part on the assumption that the district court properly rejected Mrs. Astaire's claim that Best used the film clips and photographs for purposes of advertising or selling, or soliciting purchases of, the Video Cassettes. *See* Petition at 15 (asserting that "[a]pplication of the [Section 990(n)(1)] exception here is even clearer because the District Court in this case has found that there was no use in 'an advertisement or commercial announcement.'"). Because the correctness of the district court's ruling on that issue will not be before this court unless and until Mrs. Astaire seeks appellate review at a later point in the case, review of Best's hypothetical argument at this stage of the proceedings would be premature.

[13]Moreover, this issue, like the other arguments raised by Best, would be rendered moot by a ruling that Mrs. Astaire presented sufficient evidence to permit a jury to find that Best used the film clips and photographs for the purpose of advertising or selling, or soliciting purchases of, the Video Cassettes. Accordingly, there is no reason to address Best's argument now, because it may ultimately be unnecessary to address it at all.

fundamental canons of statutory construction, forbid such a result. *See* 3/8/94 Order at 2 – 7.

In support of its countertextual reading of Section 990(a), Best cites numerous California cases construing California Civil Code Section 3344(a), the statute governing right-of-publicity claims by living celebrities. What Best understandably fails to point out to this court in its Petition, however, is that Section 3344(a) did not include a cause of action for the use of celebrity likenesses "on or in products" until 1984, when it was amended to bring its language into conformity with Section 990(a). See 1984 Cal. Stat., ch. 1704, § 2. Prior to that date, Section 3344(a) authorized suit only where a celebrity's name or likeness was used for the purpose of advertising or soliciting purchases. Thus, the pre-1984 authorities on which Best relies — *Eastwood v. Superior Court,* 149 Cal.App.3d 409, 198 Cal.Rptr. 342 (1983); *Johnson v. Harcourt, Brace, Jovanovich, Inc.,* 43 Cal.App.3d 880, 118 Cal.Rptr. 370 (1974), and their progeny — are wholly inapposite.[14] In the absence

[14]None of the post-1984 California cases cited by Best involves the question at issue here. *Maheu v. CBS, Inc.,* 201 Cal.App.3d 662, 676 – 77, 247 Cal.Rptr. 304 (1988), for example, involved the meaning of the statutory exemption for news accounts (California Civil Code Section 3344(d)), and provided no opportunity for the court to address the scope of liability under the "uses . . . on or in products" prong of Section 3344(a). Similarly, in *Dora v. Frontline Video, Inc.,* 15 Cal.App.4th 536, 544 – 46, 18 Cal.Rptr.2d 790 (1993), the court held that a documentary about surfing qualified as a "public affairs . . . account" within the meaning of the Section 3344(d) exemption, but did not purport to address the question whether the use of a celebrity's likeness "on or in products" is actionable in the absence of a use for the purpose of advertising, selling, or solicitation. Finally, in *Leidholdt v. L.F.P. Inc.,* 860 F.2d 890, 895 (9th Cir. 1988), *cert. denied,* 489 U.S. 1080 (1989), this court held that a magazine's use of the plaintiff's likeness to accompany an article expressing the magazine's "opinions in the pornography debate" fell within the Section 3344(d) exemption for uses in " 'any news [or] public affairs . . . account.' " The court did not

of contrary California authority, the district court did not err in construing the statute in accordance with its language, legislative history, and governing canons of construction.

4. There Is No Substantial Group For Difference Of Opinion With Respect To The District Court's Rejection Of Best's First Amendment Defense

Finally, Best contends that the First Amendment shields Best from any liability for its use of the film clips and photographs because the Video Cassettes constitute "an educational medium" of expression and the use of the clips and photographs was "reasonably related to the content of th[at] expression." Petition at 24, 31. As the district court held, however, Best previously conceded that " '[t]he introductory use of brief ornamental dance sequences involving Fred Astaire and other dancers *did not add to the teaching content of these videotapes.*" 3/8/94 order at 11 (emphasis added). Thus, Best is estopped from making a contrary argument here.

In any event, even if Best had not already conceded away this purported First Amendment defense, that defense would have no merit in the circumstances of this case. While courts have consistently held that the First Amendment protects the use of a celebrity's name or likeness in connection with the dissemination of legitimate news, biographical information, or fiction about the celebrity,[15] those cases provide no defense for Best's conduct here. The Video

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discuss the elements of a cause of action for unauthorized uses "on or in products," and thus *Leidholdt* is inapposite.

[15] *See, e.g., Leidholdt v. L.F.P., Inc.*, 860 F.2d. 890 (9th Cir. 1988), *cert. denied*, 489 U.S. 1080 (1989); *Cher v. Forum Int'l, Ltd.*, 692 F.2d 634 (9th Cir. 1982), *cert. denied*, 462 U.S. 1120 (1983); *Joplin Enterprises v. Allen*, 795 F. Supp. 349 (W.D. Wash. 1992); *Guglielmi v. Spelling-Goldberg Productions*, 25 Cal.3d 860, 862, 160 Cal.Rptr. 352 (1979) (Bird, C.J., concurring); *Dora v. Frontline Video, Inc.*, 15 Cal.App.4th 536, 18 Cal.Rptr.2d 790 (1993).

Cassettes do not convey news or biographical information about Fred Astaire, nor do they offer a fictional account of his life. Instead, they merely exploit his likeness and reputation in the context of a "How To" recreational videotape series. Best can point to no authority for the proposition that the First Amendment precludes imposition of liability in those circumstances.

C. Even If Best Has Satisfied The Statutory Prerequisites To Certification Of An Interlocutory Appeal Under Section 1292(B), This Court Should Deny Certification In The Exercise Of Its Discretion

Even if a party seeking permission to bring an interlocutory appeal satisfies its burden of demonstrating the statutory prerequisites set forth in Section 1292(b), the court of appeals retains discretion to deny permission to appeal "for any reason." *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 475 (1978); *see In re Cement Antitrust Litigation,* 673 F.2d at 1026; *Shurance,* 839 F.2d at 1348 – 49. For all of the reasons set forth above, this court should refuse to permit an interlocutory appeal under the circumstances of this case.

Indeed, this case provides a textbook example of the wisdom of the general rule against piecemeal adjudication of appeals. As noted above, Best is asking this court to decide what may well turn out to be an entirely hypothetical question, namely, whether a claim for infringement of the right of publicity is viable "where there is no use for advertising and selling." Petition at 10. In similar circumstances, other courts of appeals have properly declined to accept interlocutory appeals seeking what amount to advisory opinions on questions that may never need to be decided. *See, e.g., Oneida Indian Nation v. County of Oneida,* 622 F.2d 624, 628,(2d Cir. 1980) ("Because the premise of the certified question may be destroyed [on a future appeal], it is not yet ripe for review"); *Paschall v.*

Kansas City Star Co., 605 F.2d 403, 406 (8th Cir. 1979) ("[t]he purpose of section 1292(b) is not to offer advisory opinions"). Particularly in view of this court's general policy against unnecessarily addressing constitutional questions (*see, e.g., Portman v. County of Santa Clara*, 995 F.2d 898, 906 – 07 (9th Cir. 1993); *United States v. Feeney*, 984 F.2d 1053, 1056 (9th Cir. 1993)), interlocutory review should be denied.

IV.
CONCLUSION

Best cannot meet its burden of satisfying the prerequisites to interlocutory appeal under 28 U.S.C. § 1292(b). The present status of this litigation, the limited issue remaining to be tried, and the congested nature of this court's docket demonstrate that an immediate appeal would delay, not "materially advance," the ultimate termination of this lawsuit. Moreover, the Orders were well-grounded in law and are not subject to "substantial" grounds for difference of opinion. Mrs. Astaire therefore asks that this court deny Best's Petition so that this litigation can proceed to a speedy resolution on the district court. Once there is a final judgment in that court, the parties will be in a position either to

settle this litigation or exercise their statutory right of appeal to this court.

Dated: April 14, 1994

Respectfully submitted,

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CENTRAL DISTRICT OF CALIFORNIA
B-33
CIVIL MINUTES — GENERAL

Date 11/26/90
CV-90-0261-IH
Robyn Astaire vs. Ronby Corporation, et al

HON. IRVING HILL
Judge

R. H. MAZZARELLA
Deputy Clerk

CANDEE MARSH
Count Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:
Joseph F. Hart

ATTORNEYS PRESENT FOR DEFENDANTS:
Bruce Cohen
Carl I. Kaminsky
for Best Film & Video

Carl Hoffman
for Ronby Corp.

PROCEEDINGS:

HEARING: Plaintiff's Motion for Partial Summary Judgment
Defendants, Motions for Summary Judgment

Court hears oral argument and denies each defendants', motion for summary judgment having found bona fide disputes of material fact and that each defendant has not shown entitlement to judgment as a matter of law.

As to plaintiff's motion for partial summary judgment, the Court denies said motion on the same grounds and alterna-

tively, the Court exercises its discretionary authority to decline.

All rulings are without prejudice to similar motions being made in limine prior to trial.

With consent of the parties, the Court orders the protective order lifted except as to the will and trust agreement.

Court re-sets the Pretrial Conference on 1/28/91 at 10:00 A.M. and the __ day Jury Trial on 2/19/91 at 9:30 A.M.

Initials of Deputy Clerk

/s/ RHM

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of April 1994, I caused a copy of the foregoing Answer in Opposition to Petition for Permission to Appeal Under 28 U.S.C. 1292(b) to be mailed, postage prepaid, to:

GEORGE HEDGES, ESQ.
NANCY C. KRAYBILL, ESQ.
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/s/ THOMAS G. HUNGAR
Thomas G. Hungar

94-80135
UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBYN ASTAIRE, AN INDIVIDUAL,
Plaintiff-Respondent,

vs.

BEST FILM & VIDEO CORP.,
Defendant-Petitioner.

DC# CV-90-00261-KN
Central California
(Los Angeles)

U.S. COURT OF APPEALS
FILED
May 31, 1994
Cathy A. Catterson, Clerk

Before: HUG and FERNANDEZ, Circuit Judges

ORDER

The petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) is denied.

NOT FOR PUBLICATION
No. 95-56632
No. 95-56633
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBYN ASTAIRE,
Plaintiff-Appellee,

vs.

BEST FILM & VIDEO CORP.
Defendant-Appellant.

D.C. No. CV-90-00261-KN-A

ROBYN ASTAIRE,
Plaintiff-Appellee,

vs.

BEST FILM & VIDEO CORP.
Defendant-Appellant.

D.C. No. CV-90-00261-KN-A

U.S. Court of Appeals
Filed February 25, 1998
Cathy A. Catterson, Clerk

Before: SCHROEDER, WIGGINS, LEAVY, Circuit Judges.

ORDER

Judges Wiggins and Leavy vote to deny the petition for rehearing and recommend rejection of the suggestion for rehearing *en banc*. Judge Schroeder votes to grant the petition for rehearing and accept the suggestion for rehearing *en banc*.

The full court has been advised of the suggestion for rehearing *en banc,* and no judge has requested a vote on the suggestion for rehearing *en banc.* Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing *en banc* is rejected.